No. 16-424	
Title:	**Rodney Class, Petitioner** v. **United States**
Docketed:	September 30, 2016
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Numbers:	(15-3015)
Decision Date:	July 5, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 30 2016	Petition for a writ of certiorari filed. (Response due October 31, 2016)
Oct 27 2016	Order extending time to file response to petition to and including November 30, 2016.
Nov 16 2016	Order further extending time to file response to petition to and including December 20, 2016.
Dec 20 2016	Brief of respondent United States in opposition filed.
Jan 03 2017	DISTRIBUTED for Conference of January 19, 2017.
Jan 03 2017	Reply of petitioner Rodney Class filed. (Distributed)
Feb 06 2017	DISTRIBUTED for Conference of February 17, 2017.
Feb 21 2017	Petition GRANTED.
Mar 15 2017	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 12, 2017.
Mar 15 2017	The time to file respondent's brief on the merits is extended to and including July 17, 2017.
May 12 2017	Joint appendix filed. (Statement of costs received.)

May 12 2017	Brief of petitioner Rodney Class filed.
May 12 2017	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for the petitioner.
May 19 2017	Brief amici curiae of The National Association of Criminal Lawyers, et al. filed
May 19 2017	Brief amicus curiae of Albert W. Alschuler filed.
May 19 2017	Brief amicus curiae of The Innocence Project filed.
Jul 17 2017	Brief of respondent United States filed.
Jul 19 2017	SET FOR ARGUMENT on Wednesday, October 4, 2017.
Aug 01 2017	Record requested from the U.S.C.A. District of Columbia Circuit.
Aug 09 2017	CIRCULATED
Aug 16 2017	Reply of petitioner Rodney Class filed. (Distributed)
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RECORD AND BRIEF

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No. _____

IN THE
Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), this Court held that a defendant who pleads guilty can still raise on appeal any constitutional claim that does *not* depend on challenging his "factual guilt." In *Blackledge* and *Menna*, the Court held that double jeopardy and vindictive prosecution are two such claims that are not inherently resolved by pleading guilty, because those claims do not challenge whether the government could properly meet its burden of proving each element of the crime.

In the years since this Court decided *Blackledge* and *Menna*, the circuit courts have deeply divided on whether a defendant's challenge to the constitutionality of his statute of conviction survives a plea, or instead is inherently waived as part of the concession of factual guilt.

The question presented is:

Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodney Class respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The D.C. Circuit's July 5, 2016, opinion (Pet.App.1a) is unpublished. The District Court for the District of Columbia's October 27, 2014, oral order denying Petitioner's motion to dismiss the indictment (Pet.App.6a) is unreported. The district court's April 16, 2014, memorandum order denying in part Petitioner's motion to dismiss the indictment (Pet.App.10a) is reported at 38 F. Supp. 3d 19.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit entered its judgment on July 5, 2016.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const., amend. V, and 40 U.S.C. §§ 5101, 5102, 5104, and 5109. These provisions are reproduced in the Constitutional and Statutory Addendum.

INTRODUCTION

The circuit courts are deeply divided on an issue that has a significant impact on the orderly operation of the criminal justice system: whether a defendant, by pleading guilty, inherently waives his right to challenge the constitutionality of his statute of conviction.

In a tandem of cases decided in the 1970s, this Court held that a guilty plea does *not* "inevitably 'waive' all antecedent [*i.e.*, pre-plea] constitutional violations." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (*per curiam*); *accord Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974) (together, "*Blackledge/Menna*"). Rather, a plea inherently concedes only the defendant's "factual guilt," which "renders irrelevant" any claim that depends on challenging the government's evidence of guilt, *Menna*, 423 U.S. at 62 n.2, such as procedural defects or Fourth Amendment violations, *Blackledge*, 417 U.S. at 30.

However, a small set of constitutional claims do not depend on challenging factual guilt. In *Blackledge* and *Menna*, the defendants argued respectively that their prosecutions were barred by double jeopardy and vindictive prosecution, meaning that the government "may not convict [them] no matter how validly [their] factual guilt is established." *Menna*, 423 U.S. at 62 n.2. Such claims would succeed even if the government proffered overwhelming evidence that the defendants had violated the relevant statutes. Accordingly, these claims are not resolved by pleading guilty, and the defendant is therefore not *inherently* foreclosed from raising them on appeal.

In the intervening years, the circuits have sharply divided on how *Blackledge/Menna* applies where a defendant pleads guilty and appeals on the ground that the statute of conviction itself is unconstitutional. *See* Part I, *infra*. Some circuits—including the D.C. Circuit below—hold that a plea inherently waives the right to challenge the constitutionality of the statute of conviction, while other circuits broadly allow such challenges after a plea.

Resolving the split on this issue would make guilty plea proceedings more predictable, thereby benefitting defendants, prosecutors, and courts alike. *See* Part II.A, *infra*. Guilty pleas are a ubiquitous part of the criminal justice system. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). The "horse trading" between prosecutors and defense counsel largely "determines who goes to jail and for how long." *Id.* (quotation marks omitted). During such negotiations, neither the prosecutor nor the defendant benefits from incomplete information regarding what claims could inherently survive a guilty plea. The lack of clarity also negatively affects the courts because district courts risk conducting misleading colloquys. Moreover, the split in the circuit courts means that the scope of review after a guilty plea varies significantly depending solely on where a defendant is indicted and pleads guilty.

Petitioner's case squarely presents the Court with an opportunity to resolve this issue. *See* Part II.B, *infra*. At the district court, Petitioner and the government thoroughly briefed Petitioner's constitutional challenges to his statute of conviction,

none of which concerned Petitioner's factual guilt. Petitioner subsequently pleaded guilty and was sentenced in accordance with his plea. Petitioner then appealed to the D.C. Circuit and re-raised his constitutional claims. The court refused to consider his attacks on the constitutionality of the statute, holding that Petitioner's guilty plea "waive[d]" all "claims of error on appeal, even constitutional claims." Pet.App.3a (quotation marks omitted).

The D.C. Circuit's ruling was directly contrary to this Court's holding in *Menna* that guilty pleas do *not* "inevitably 'waive' all antecedent constitutional violations" and that a defendant can still raise claims that "stand in the way of conviction [even] if factual guilt is validly established." 423 U.S. at 62 n.2. The D.C. Circuit's ruling was also contrary to the rulings of the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, all of which interpret *Blackledge/Menna* to permit constitutional challenges to the validity of a statute following a guilty plea.

The Court should grant the petition, resolve the circuit split, and reverse the D.C. Circuit's improperly narrow interpretation of *Blackledge/Menna*.

STATEMENT OF THE CASE

A. Background Facts.

Petitioner is a retired veteran who resides in North Carolina. Petitioner has a concealed-carry firearm permit from North Carolina. During a May 2013 trip to Washington, D.C., Petitioner left his lawfully-owned

firearms secured out-of-sight in bags inside his locked vehicle, which he parked in a publicly-accessible parking lot on Maryland Avenue, S.W., about 1000 feet away from the foot of the U.S. Capitol Building. *See* J.A.125.[1]

Unbeknownst to Petitioner, the parking lot was considered part of the Capitol Grounds, where all weapons are prohibited pursuant to 40 U.S.C. § 5104(e). No signs indicated that the lot was part of the Capitol Grounds or that weapons were prohibited. J.A.125 n.1. A police officer looked into the cab of Petitioner's vehicle and saw what she mistakenly believed was a gun holster. J.A.125; J.A.162, ¶ 1. When Petitioner returned to his car, he was arrested, and his vehicle was searched. The object the officer saw was not a gun holster, but the search revealed three firearms that Petitioner had stored out-of-sight, as well as several knives. J.A.162, ¶¶ 2, 4.

Petitioner was charged in the U.S. District Court for the District of Columbia with one count of violating 40 U.S.C. § 5104(e).[2]

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[1] Citations to "J.A." refer to the Joint Appendix filed in the D.C. Circuit on November 20, 2015.

[2] Petitioner was also charged with violating D.C. Code § 22-4504(a), but that charge was dropped after § 22-4504(a) was declared unconstitutional. *See Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

B. Petitioner Attacks The Constitutionality Of § 5104(e) At The District Court.

Petitioner filed numerous motions to dismiss the indictment, arguing *inter alia* that his storage of lawfully-owned weapons in his locked vehicle was protected by the Second Amendment. *See, e.g.*, J.A.32-33, J.A.36, J.A.43, J.A.46. He also raised a due process notice claim, arguing that he had not been given fair warning that weapons were banned in the parking lot, which was freely accessible by the public. *See* J.A.39.

On April 7, 2014, the district court held a hearing where Petitioner presented arguments on his Second Amendment and due process claims. *See* J.A.65, 69. On April 16, 2014, the court issued an order that addressed Petitioner's arguments. *See* Pet.App.10a-16a; J.A.70-100. The court stated that "to the extent Defendant challenges his prosecution under the Second Amendment of the Constitution, the Government has not submitted a substantive response to this argument. The Court therefore lacks an adequate record on which to evaluate it." Pet.App.16a. The court ordered the government "to file further briefing on this issue." *Id.*

On May 1, 2014, the government filed a brief in response to the district court's order. J.A.101-21. The government extensively addressed the question of whether the Second Amendment, as interpreted by this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), would prohibit Petitioner's prosecution. J.A.106-13. The government did not provide any

specific evidence or documentation to support its claimed substantial interest in prohibiting all weapons, even when securely stored in cars parked 1000 feet away from the Capitol. Instead, the government argued that all government property is inherently a "sensitive place" where there is no right to armed self-defense. J.A.112.

The government later filed motions that addressed many of the due process/notice arguments that Petitioner had previously raised. The government argued that there could be no notice or warning concerns because: (1) § 5104(e) has no "knowledge and/or intent requirements" (*i.e.*, the statute has "no ... *mens rea* element"), J.A.124, 130; and (2) the statute defining the Capitol Grounds made a "clear reference," J.A.138, to the relevant parking lot when it designated "all grounds bounded by the curblines of First Street, Southwest on the east; Washington Avenue, Southwest to its intersection with Independence Avenue, and Independence Avenue from such intersection to its intersection with Third Street, Southwest on the south; Third Street, Southwest on the west; and Maryland Avenue, Southwest on the north" as being part of the Capitol Grounds. 40 U.S.C. § 5102(c)(1)(C).

On October 27, 2014, the district court orally denied Petitioner's claim that his Second Amendment rights had been violated, concluding that a government-owned parking lot was the same as a "government building[]" where all weapons could presumptively be banned. Pet.App.9a. The court did not address—and therefore

implicitly denied—Petitioner's due process/notice argument.

C. Petitioner Pleads Guilty.

Petitioner's case was set for trial, but he sent a letter to the court indicating that he would be unable to appear. J.A.145. He subsequently pleaded guilty to the one remaining charge of violating § 5104(e).

The plea conceded that Petitioner had violated § 5104, *see* J.A.161, but it did *not* contain any express waiver of the right to appeal Petitioner's conviction, nor did it concede in any way that § 5104 itself was constitutional, *see* J.A.157. The plea also included an integration clause stating that the plea comprised the "[c]omplete [a]greement" between the parties and that no "promises, understandings, or representations have been made ... other than those contained in writing herein." J.A.159.

At the plea colloquy, the district court told Petitioner that he could "appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." S.A.102.[3]

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[3] Citations to "S.A." refer to the Supplemental Appendix filed at the D.C. Circuit on February 22, 2016.

D. The D.C. Circuit Holds That A Plea Inherently Waives All Constitutional Claims.

Because the plea lacked any clause waiving his right to appeal his conviction, Petitioner immediately appealed to the D.C. Circuit and filed a *pro se* opening merits brief, focusing on his claim that his Second Amendment rights had been violated. The government did not move to dismiss the appeal as barred by the guilty plea. The D.C. Circuit then appointed counsel to serve as *amicus curiae* to argue in favor of Petitioner.

Amicus fully briefed the primary constitutional challenges that Petitioner had raised at the district court, and Petitioner expressly adopted the *amicus*'s arguments on appeal as his own.[4] Petitioner argued that the Second Amendment protects the right to "keep and bear arms" for self-defense, and that § 5104(e) infringed on that right by effectively banning law-abiding citizens from securely storing lawfully owned weapons in their cars parked in a publicly accessible lot.

Petitioner also argued that § 5104(e), both facially and as-applied, violates the due process clause because it fails to give fair warning as to what areas are considered the Capitol Grounds and thus where weapons are banned. The statutory language defining the relevant portion of the Grounds is exceedingly confusing, making it unclear whether the Grounds

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[4] *See* Pet. Notice Adopting *Amicus* D.C. Cir. Br. (Nov. 30, 2015).

include the parking lot itself, or merely the land adjacent to it. Further, there were no signs in or around the lot that gave any warning that it was part of the Grounds or that weapons were banned. Petitioner argued that the lack of any notice, especially when combined with the government's argument that § 5104(e) had no *mens rea* requirement, violated due process.

In response, the government argued—for the first time, nearly 12 months after Petitioner filed his opening brief—that even though Petitioner's plea did not contain any express waiver of the right to appeal his conviction, the plea *inherently* waived his right to raise any constitutional claims that accrued before he pleaded guilty, including his constitutional challenges to the statute. *See* Gov't D.C. Cir. Br. 28 & n.15.

Petitioner argued in response that his constitutional challenges survived his guilty plea pursuant to this Court's holdings in *Blackledge* and *Menna*. Like the defendants in those cases, Petitioner was not challenging his "factual guilt"—*i.e.*, whether the government could properly satisfy each element of the statute. Rather, Petitioner argued that, even assuming that factual guilt was shown, Petitioner still could not be validly convicted because § 5104 itself was unconstitutional. Petitioner argued that the plea did not address that issue, and therefore the court should reach the merits of his constitutional challenges to the statute.

After oral argument, the D.C. Circuit issued an opinion on July 5, 2016, affirming Petitioner's conviction and refusing to address the merits of any of his claims. Pet.App.1a-5a. The court's holding was based on two premises. *First*, the court cited *Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973), for the "universally-recognized law" that a guilty plea inherently "waive[s] the pleading defendant's claims of error on appeal, even constitutional claims." Pet.App.3a-4a (quotation marks and alteration omitted). The court did not address *Menna*'s rejection of this interpretation of *Tollett*. 423 U.S. at 62 n.2.

Second, the D.C. Circuit cited its own precedent holding that a claim survives under *Blackledge/Menna* only where the constitutional violation is so flagrant that the defendant could not even be "haled into court" to defend himself, Pet.App. 4a (quoting *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004)), even though the defendants in *Blackledge* and *Menna* themselves had to appear in court to answer the charges against them. 417 U.S. at 30; 423 U.S. at 61-62.

REASONS FOR GRANTING THE PETITION

The Court should grant *certiorari* to address the important questions of law presented herein, which have divided the lower courts.

The circuit courts are deeply split on the proper interpretation of this Court's decisions in *Blackledge* and *Menna*. Some circuits, including the D.C. Circuit below, have narrowed *Blackledge* and *Menna* to their facts and held that a plea inherently waives *every* underlying constitutional claim except the double jeopardy and vindictive prosecution claims that were at issue in *Blackledge* and *Menna* themselves. Other circuits, including the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, recognize that *Blackledge* and *Menna* are based on the principle that a guilty plea concedes factual guilt—but does not necessarily concede or waive the constitutionality of the statute of conviction itself. These circuits hold that a plea does not inherently waive the right to raise facial or as-applied challenges to the constitutionality of the statute of conviction. A third group of circuits, including the Fourth, Seventh, and Eighth Circuits, strikes a middle ground, allowing facial—but not as-applied—challenges to survive a guilty plea.

Resolving this split is important for all participants in the criminal justice system because the lack of clarity causes significant unpredictability in guilty plea negotiations and especially the subsequent proceedings, where the circuit courts are often confused about which claims they must address after a plea. This issue is also recurrent. "Criminal justice

today is for the most part a system of pleas, not a system of trials," *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012), as evidenced by the fact that pleas account for 95% of criminal case resolutions in federal court, Lindsey Devers, Bureau of Justice Assistance, U.S. Dep't of Justice, *Plea and Charge Bargaining* 1 (2011), https://www.bja.gov/Publications/PleaBargaining ResearchSummary.pdf. The criminal justice system is essentially a series of plea negotiations—and yet the parties to those negotiations are operating without a clear understanding of the necessary consequences of the plea itself. Whether a defendant can plead guilty and then argue that his or her statute of conviction is unconstitutional depends at the present time simply on the circuit in which the defendant is convicted. Thus, a defendant raising the same claims in the D.C. Circuit would necessarily be subject to a different outcome in the Third, Fifth, Sixth, Ninth, or Eleventh Circuits.

Petitioner's case is an excellent vehicle for resolving this issue. His Second Amendment and due process claims were raised at both the district court and circuit court. Further, his Second Amendment claim was as-applied, while his due process claim was both as-applied and facial. Accordingly, this case presents the Court with the opportunity to address how *Blackledge* and *Menna* apply to both facial and as-applied challenges. Further, Petitioner's guilty plea did not expressly waive his right to appeal his convictions, meaning that his arguments are not independently barred by such a clause.

Finally, the D.C. Circuit's holding below was wrong. The court's ruling that a plea inherently waives any ability to challenge the constitutionality of the statute of conviction is directly contrary to this Court's holding in *Menna* that guilty pleas do *not* "inevitably 'waive' all antecedent constitutional violations." 423 U.S. at 62 n.2. Indeed, the D.C. Circuit's test for which claims survive a plea—*i.e.*, only those claims where the defendant would not even have to come to court to raise them—is so narrow that not even the challenges in *Blackledge* and *Menna* themselves would satisfy it.

The Court should grant the petition.

I. THE CIRCUIT COURTS ARE DEEPLY DIVIDED ON THE QUESTION PRESENTED.

The decision below stated that it was "universally recognized" that a guilty plea inherently waives all "constitutional claims." Pet.App.3a-4a (quotation marks omitted). However, that is far from accurate. The circuit courts are split into three distinct groups on the issue. Three circuits, including the court below, hold that a plea waives every constitutional challenge to the statute of conviction. Five circuits correctly hold that a plea does not waive facial or as-applied challenges to the statute of conviction. And three circuits hold that a plea waives as-applied—but not facial—challenges. This disarray in the circuits means that two defendants raising the same exact constitutional claims in different circuits could have

vastly different outcomes. This Court's intervention is needed to address this situation.

A. Three Circuits Hold That A Guilty Plea Inherently Waives All Constitutional Challenges To The Statute Of Conviction.

The court below, along with the First and Tenth Circuits, has strictly limited *Blackledge* and *Menna* to their facts. These three courts hold that while the specific constitutional claims at issue in *Blackledge* and *Menna*—double jeopardy and vindictive prosecution—can survive a plea, no other claims can survive, including even a facial challenge to the statute.

D.C. Circuit. In its decision below, the D.C. Circuit refused to address Petitioner's Second Amendment and due process challenges to § 5104(e) because "unconditional guilty pleas ... waive the defendant's claims of error on appeal, *even constitutional claims.*" Pet.App.3a (alterations and quotation marks omitted; emphasis added). The court held that the only exceptions to this rule are (1) "the defendant's claimed right not to be haled into court at all," and (2) a claim that "the court below lacked subject matter jurisdiction." Pet.App.4a (quotation marks omitted). The court concluded without analysis that Petitioner's Second Amendment and due process challenges to § 5104(e) did not fit either of these exceptions. *Id.*

The decision below repeatedly cited the D.C. Circuit's prior precedent in *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004), where the

defendants argued that the statute of conviction violated the due process clause. *Id.* at 1343. The court held that the guilty plea in that case inherently waived "a claim that the due process clause limits the substantive reach of the conduct elements" of the statute of conviction. *Id.* (citing *Blackledge* and *Menna*). Thus, the plea waived any claim that the statute's scope was unconstitutional. The court further held that even if the statute was unconstitutional, the defendants would "still need to come to court to answer the charge brought against them," and therefore the claim did not qualify under *Blackledge/Menna*. *Id.* (quotation marks omitted); *accord United States v. Miranda*, 780 F.3d 1185, 1190 (D.C. Cir. 2015) (citing *Blackledge* and *Menna* for proposition that guilty plea inherently waived claim that statute of conviction exceeded Congress's Article I powers).

Accordingly, the D.C. Circuit has effectively narrowed *Blackledge* and *Menna* to their facts: except for double jeopardy and vindictive prosecution, no claims survive a guilty plea.[5]

First Circuit. Relying on D.C. Circuit caselaw, the First Circuit has likewise held that, after a defendant pleads guilty, the court will consider *only* the exact claims from *Blackledge* and *Menna* themselves: a "'due process challenge arising from repetitive, vindictive prosecution' and a double jeopardy challenge." *United*

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[5] That is, aside from the universally-accepted rule that any party can raise a lack of subject matter jurisdiction at any time. Pet.App.4a.

States v. Diaz-Doncel, 811 F.3d 517, 518 n.2 (1st Cir. 2016) (citing *Blackledge* and *Menna*). Aside from those *sui generis* "exception[s]," in the First Circuit, "a guilty plea waives all objections," including a claim that Congress exceeded its authority under Article I to pass the statute of conviction. *Id.*; *accord United States v. Gonzalez*, 311 F.3d 440, 442 (1st Cir. 2002).

Tenth Circuit. The Tenth Circuit has a similarly grudging interpretation of *Blackledge* and *Menna*. In *United States v. De Vaughn*, 694 F.3d 1141 (10th Cir. 2012), the court refused to consider a defendant's claim that the statute to which he had pleaded guilty violated the First Amendment. The court stated that a guilty plea waives all such claims, and "*Blackledge* and *Menna* merely carved out exceptions for two types of constitutional claims"—double jeopardy and vindictive prosecution. *Id.* at 1152. No other claims survive this "narrow exception." *Id.* at 1145, 1152-54.

B. Five Circuits Broadly Allow Post-Plea Challenges To The Constitutionality Of The Statute Of Conviction.

At the opposite end of the spectrum, a group of circuits, including the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, have correctly held that a guilty plea does not inherently waive a defendant's right to challenge his statute of conviction, regardless of whether the challenge is styled as facial or as-applied. Had Petitioner been charged in any of these circuits, the circuit court would have addressed the merits of

both his Second Amendment and his due process claims.

Third Circuit. In *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002), the defendant entered into an unconditional guilty plea and then appealed on the ground that the statute of conviction was "unconstitutional as applied to the facts of her case" because it exceeded Congress's powers under the Commerce Clause. *Id.* at 260. The Third Circuit reached the merits of the claim, finding that it was "properly ... within the narrow scope of review not barred by a guilty plea." *Id.* at 262. Other Third Circuit opinions have held likewise. *See United States v. Bishop*, 66 F.3d 569, 572 n.1 (3d Cir. 1995) (citing *Blackledge* and *Menna*); *United States v. Rodia*, 194 F.3d 465, 469 (3d Cir. 1999).

Fifth Circuit. The Fifth Circuit has relied on *Menna* to broadly hold that "a guilty plea does not waive the right of the defendant to challenge the constitutionality of a statute under which he is convicted." *United States v. Knowles*, 29 F.3d 947, 952 (5th Cir. 1994). While *Knowles* was an as-applied challenge, a prior Fifth Circuit decision strongly suggests that a defendant could widely challenge the constitutionality of a statute because a plea inherently resolves "only ... violations of those *procedural rights* guaranteed by due process which are incident to the criminal investigation and prosecution." *Askew v. Alabama*, 398 F.2d 825, 825 n.1 (5th Cir. 1968) (*per curiam*) (emphasis added).

Sixth Circuit. The Sixth Circuit has also held that "it is well settled that a guilty plea does not waive the right of an accused to challenge the constitutionality of the statute under which he is convicted." *United States v. Skinner*, 25 F.3d 1314, 1316-17 (6th Cir. 1994) (citing *Blackledge*). The Sixth Circuit has applied this rule both to facial challenges, *id.* at 1316, and as-applied challenges, *United States v. Dettra*, 238 F.3d 424, 2000 WL 1872046, at *1, *3 (6th Cir. 2000) (unpublished table decision) (citing *Skinner*, 25 F.3d at 1317).

Ninth Circuit. The Ninth Circuit has also held that a challenge to the validity of a statute outlasts a guilty plea. In *Journigan v. Duffy*, 552 F.2d 283 (9th Cir. 1977), the court held that "[e]ven if the guilty plea establishes as a factual matter that [the defendant] did the acts charged, a successful constitutional attack on the statute violated by those acts would undermine the foundation of the criminal prosecution, making those acts noncriminal." *Id.* at 289 (citing *Blackledge* and *Menna*).

Pursuant to *Journigan*, the court held in *United States v. Sandsness*, 988 F.2d 970 (9th Cir. 1993), that a guilty plea did not bar a defendant's facial or as-applied vagueness challenges on appeal. *Id.* at 971-72.; *accord United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979) (reaching merits of defendant's as-applied vagueness challenges).

Eleventh Circuit. In *United States v. Palacios-Casquete*, 55 F.3d 557 (11th Cir. 1995), the Eleventh Circuit reached the merits of a facial challenge because

a "guilty plea ... does not waive the right of an accused to challenge the constitutionality of the statute under which he is convicted." *Id.* at 561. In *United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011), the court indicated that this rule would apply not just to facial challenges but also to any challenge that could be determined based on "the record at the time of the plea." *Id.* at 1208 (quotation marks omitted).

C. Three Circuits Allow Facial—But Not As-Applied—Challenges To The Statute Of Conviction.

Between these two poles, three circuits have charted a middle course. The Fourth, Seventh, and Eighth Circuits hold that facial—but not as-applied—challenges to a statute can survive a defendant's guilty plea. These circuits draw this distinction despite the notable fact that *Blackledge* and *Menna* themselves were *as-applied* challenges. 417 U.S. at 30; 423 U.S. at 61-62. These courts would refuse to consider Petitioner's as-applied Second Amendment challenge, but they would likely still review Petitioner's due process challenge. *See infra* at 31 n.10 (discussing the numerous flaws in these circuits' facial versus as-applied distinction).

Fourth Circuit. In unpublished decisions, the Fourth Circuit has addressed facial challenges, *see United States v. Aranda*, 612 F. App'x 177, 178 n.1 (4th Cir. 2015) (citing *Menna*), but has refused to address the merits of as-applied claims, finding such claims were waived, *see United States v. Kelly*, 102 F. App'x

838 (4th Cir. 2004) (citing *Menna*). The court has not offered a rationale for the distinction.

Seventh Circuit. The Seventh Circuit likewise addresses facial but not as-applied challenges to a statute post-plea. The court has explained that "[w]hile a facial attack on a statute's constitutionality is jurisdictional, an as-applied vagueness challenge is not." *United States v. Phillips*, 645 F.3d 859, 863 (7th Cir. 2011) (citing *Blackledge* and *Menna*). Accordingly, in the Seventh Circuit, a plea cannot waive a facial challenge.

Eighth Circuit. In *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010), the Eighth Circuit addressed a facial challenge, but held that as-applied challenges are inherently waived by a plea because they are not "jurisdictional in nature." *Id.* at 922-23 (citing *Blackledge* and *Menna*).

* * *

As the deep split in circuit authority shows, the circuit courts lack clarity on the scope of the *Blackledge/Menna* doctrine. In the forty-plus years since *Blackledge* and *Menna* were issued, this Court has addressed the doctrine only once, *see United States v. Broce*, 488 U.S. 563 (1989), in a decision that did not elucidate the rationale or scope of *Blackledge/Menna* but merely re-affirmed that the constitutional determinations must be made using the "existing record" at "the time the plea was entered." *Id.* at 575-76.

It is time for this Court to address the effects of a guilty plea on a defendant's ability to raise constitutional challenges on appeal. All sides to this split have been fully aired in the courts of appeals. Only this Court can resolve the disagreement.[6]

II. THIS CASE IS WORTHY OF THIS COURT'S REVIEW.

A. This Issue Is Recurring And Important.

Resolving this issue is important because the vast majority of federal criminal cases are resolved via guilty plea—yet, because of the lack of clarity in this area, the prosecutor, defendant, and courts lack complete information about what claims will survive the plea.

1. Guilty pleas account for approximately 95% of all resolved federal criminal cases. *See* Devers, *supra*, 1; *Lafler*, 132 S. Ct. at 1388. Given these numbers, it is

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[6] The only circuit with criminal jurisdiction that has not fully weighed in on this issue is the Second Circuit, whose caselaw is unclear. In *United States v. Curcio*, 712 F.2d 1532 (2d Cir. 1983), Judge Friendly's opinion for the court correctly summarized the *Blackledge/Menna* rule: "[A] defendant who has been convicted on a plea of guilty may challenge his conviction on any constitutional ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect." *Id.* at 1539 (quotation marks omitted). However, more recently, the court has suggested without explanation that an unconditional plea waives all constitutional challenges. *See United States v. Lasaga*, 328 F.3d 61, 63 (2d Cir. 2003).

unsurprising that the question presented here arises with frequency in the courts of appeals, as shown by the significant number of cases that have weighed in on the split. *See* Part I, *supra*. But the current state of confusion resulting from *Blackledge* and *Menna* reduces the predictability of plea negotiations and, in particular, the subsequent plea proceedings and appeals. Thus, a ruling clarifying this area of law would greatly benefit defendants, prosecutors, and courts alike.

During guilty plea negotiations, the defendant and the government both benefit from having a complete picture of all relevant facts, including what kinds of claims could survive the plea. "[I]nformed consideration of [significant consequences of a plea] can only benefit both the State and ... defendants during the plea-bargaining process." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). When the parties know all the relevant facts, they can meaningfully and knowingly account for them in their bargaining. Thus, by "bringing [such] consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Id.*

But neither side benefits when the law is unclear about the "likely consequences" of a plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). The government can be surprised when a defendant appeals on a claim the government thought had been conceded; and a defendant can be surprised when a court refuses

to consider a claim that he believed was inherently preserved.

The same rule is true for the courts themselves. In the plea colloquoy, the district court must adequately inform the defendant of the rights he is waiving. *See, e.g.*, Fed. R. Crim P. 11. That is difficult where the law is unclear as to what effect the plea itself will have on the defendant's right to raise certain claims on appeal. Circuit courts likewise would benefit from clarity on this issue because they may be improperly foreclosing claims that they have a duty to address, or perhaps are wasting resources by requiring full briefing on the merits of claims that should *not* be heard.

2. The importance of this issue is not diminished by the fact that Rule 11(a)(2) provides a limited mechanism for defendants to preserve certain claims for appeal. *See* Fed. R. Crim P. 11(a)(2). *First*, the procedure in Rule 11(a)(2) is entirely separate from the constitutional rule established in *Blackledge* and *Menna*, a point that the Advisory Committee on Rules made clear: "Subdivision 11(a)(2) ... should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application," because "Subdivision 11(a)(2) has no application to such situations." Fed. R. Crim P. 11 Advisory Committee's Notes to 1983 Amendment (emphasis added). Thus, Rule 11(a)(2) was designed solely to provide a means for preserving claims that challenge factual guilt, which do not inherently survive under *Blackledge/Menna*.

Second, Rule 11(a)(2) requires the prosecutor's permission for the defendant to preserve a claim. *See* Fed. R. Crim. P. 11(a)(2). But a defendant should not have to rely on "the mercy of *noblesse oblige*" just to invoke his pre-existing constitutional rights under *Blackledge* and *Menna*. *United States v. Stevens*, 559 U.S. 460, 480 (2010).

For these reasons, a decision by this Court on the question presented would greatly improve the predictability and fairness of guilty plea negotiations and proceedings.

B. This Case Is An Excellent Vehicle.

This case provides an excellent vehicle to resolve the three-way split in the circuits.

First, Petitioner has raised both as-applied and facial challenges to his statute of conviction. His Second Amendment and due process challenges were extensively briefed at the district court prior to the plea,[7] and then were raised again at the circuit court.[8] In fact, the district court ordered the government to further brief the Second Amendment claim, giving the government a full opportunity to develop the record.

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[7] *See* J.A.32-33, J.A.36, J.A.39, J.A.43, J.A.46, J.A.65, J.A.69, J.A.70-121, J.A.124-40, Pet.App.10a-16a.

[8] *See Amicus* D.C. Cir. Opening Br. 16-56; Gov't D.C. Cir. Br. 33-61; *Amicus* D.C. Cir. Reply Br. 15-29.

Accordingly, this case presents this Court with the opportunity to address how *Blackledge/Menna* applies to both facial and as-applied claims, giving the Court the option of adopting any of the three competing interpretations of *Blackledge/Menna*.

Second, Petitioner's guilty plea does not contain an explicit waiver of his right to appeal his conviction. *See* Pet.App.4a; J.A.157. Thus, there is no obstacle to this Court reaching the question presented here.

Third, a ruling in Petitioner's favor would serve as a bulwark against prosecutorial overreach, without the risk of flooding the circuit courts with frivolous appeals. Pre-plea procedural and evidentiary claims—which amount to the vast majority of constitutional claims that defendants raise pre-trial—would *still* be rendered moot by a plea, just as this Court held in *Blackledge* and *Menna*, because such claims inherently challenge the defendant's factual guilt. *See* 417 U.S. at 30-31.

III. THE D.C. CIRCUIT'S DECISION IS WRONG.

The Court should grant review for the additional reason that the D.C. Circuit's decision below is contrary to this Court's precedent. The D.C. Circuit has effectively limited *Blackledge* and *Menna* to their facts, concluding that a guilty plea waives all pre-plea claims, except for *sui generis* exceptions for claims of double jeopardy and prosecutorial vindictiveness. And the D.C. Circuit's explanation for why those two claims survive is actually inconsistent with *Blackledge* and *Menna* themselves.

1. The court below relied on *Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973), for the proposition that a plea inherently "waives" all "claims of error on appeal, even constitutional claims." Pet.App.3a-4a. However, this Court in *Menna* expressly rejected that interpretation of *Tollett*: "Neither *Tollett* ... nor [the Court's prior guilty plea decisions] stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations." *Menna*, 423 U.S. at 62 n.2; *see also Blackledge*, 417 U.S. at 29.

Menna recognized that what a plea actually does is establish factual guilt, *i.e.*, it serves as "an admission of all the elements of a formal criminal charge." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). This admission "renders irrelevant" claims that depend on challenging factual guilt—such as evidentiary disputes and procedural errors. *Menna*, 423 U.S. at 63 n.2.

But a plea says nothing about challenges that do *not* depend on disputing the evidence of factual guilt. *Id.* In those cases, the defendant is arguing that "the State may not convict [him] no matter how validly his factual guilt is established." *Id.* Stated another way by Judge Friendly: "a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be cured" by the government. *United States v. Curcio*, 712 F.2d 1532, 1539 (2d Cir. 1983) (quotation marks omitted).

Viewed through this framework, it is clear that a challenge to the constitutionality of the statute of conviction fits well within the scope of claims that survive under *Blackledge/Menna*. If § 5104(e)—the statute under which Petitioner was convicted—is unconstitutional, then the government "may not convict [Petitioner] no matter how validly his factual guilt is established," *Menna* 423 U.S. at 63 n.2, and the "practical result is to prevent a trial from taking place at all," *Blackledge*, 417 U.S. at 31 (quotation marks omitted). The government could establish conclusive evidence on each element of § 5104(e)—and yet Petitioner would still be entitled to prevail. Or, in the words of Judge Friendly, an unconstitutional statute cannot be "cured" no matter what procedures the government uses. 712 F.3d at 1539.[9]

Indeed, this Court has expressly allowed defendants to challenge the constitutionality of a statute even after pleading guilty. For example, in *Haynes v. United*

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[9] The test for which claims survive under *Blackledge* and *Menna* is very similar to this Court's test for when a habeas claim is based on a substantive rule, as opposed to a procedural rule. In habeas cases, substantive rulings—such as where this Court finds a statute is unconstitutional—apply retroactively. *See Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016). However, procedural rulings—such as Fourth Amendment decisions—do not apply retroactively. *See id.* *Blackledge* itself relied on this distinction and contrasted a double-jeopardy claim with the "procedural rules that govern the conduct of a trial." 417 U.S. at 31 (quotation marks omitted); *accord Askew*, 398 F.2d at 825 n.1 (guilty plea renders irrelevant only "those *procedural rights* guaranteed by due process which are incident to the criminal investigation and prosecution" (emphasis added)).

States, 390 U.S. 85 (1968), a case that pre-dates *Blackledge/Menna*, this Court held that the defendant's "plea of guilty did not, of course, waive" his claim that the statute of conviction "violated his privilege against self-incrimination." *Id.* at 86, 87 n.2; *see also Halbert v. Michigan*, 545 U.S. 605, 621-22 (2005) (holding that "[o]ne who pleads guilty or *nolo contendere* may still raise on appeal '*constitutional defects that are irrelevant to his factual guilt*, double jeopardy claims requiring no further factual record, [and] jurisdictional defects'" (emphasis added)).

2. The D.C. Circuit's misunderstanding of *Blackledge/Menna* is confirmed by the illogical test that the court uses for determining which claims would actually survive a plea. The D.C. Circuit has held that the *Blackledge/Menna* doctrine applies only where the constitutional claim is so manifest that the defendant would not even have "to come to court to answer the charge brought against [him]." *Delgado-Garcia*, 374 F.3d at 1343 (quotation marks omitted); *accord* Pet.App.4a.

That test cannot be correct, however, because in *Blackledge* and *Menna* themselves, the defendants still had to appear in court, answer the charge, and proffer evidence showing that the prosecution was barred by double jeopardy or vindictive prosecution. 417 U.S. at 24-25; 423 U.S. at 61. It is difficult to imagine what claim could ever survive the D.C. Circuit's test, given that every defendant must "come into court to answer the charge brought." Petitioner is aware of no authority allowing a district court to *sua sponte* dismiss

a criminal indictment on constitutional grounds, without the defendant even appearing or raising an argument.

To avoid contradicting the outcomes in *Blackledge* and *Menna* themselves, the D.C. Circuit has held that double jeopardy and vindictive prosecution claims are *sui generis* because in those cases "the very act of haling the defendant[] into court completed the constitutional violation." *Miranda*, 780 F.3d at 1190. However, that is simply incorrect. Double Jeopardy is not triggered until the jury is actually empaneled, meaning that the "very act of haling" the defendant into court does *not* "complete[] the constitutional violation" of double jeopardy. *See, e.g., Crist v. Bretz*, 437 U.S. 28, 38 (1978). This Court has likewise indicated that even a successful claim of vindictive prosecution does not mean the defendant has no obligation to appear in court, but rather that he has a right to "a new trial free of the taint of vindictiveness." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 267-68 (1982) (citing *Blackledge*, 417 U.S. at 30).

In other words, just like Petitioner, a defendant alleging double jeopardy or vindictive prosecution still must "come to court to answer the charge brought against [him]." *Delgado-Garcia*, 374 F.3d at 1343 (quotation marks omitted).

3. The practical result of the D.C. Circuit's jurisprudence is that *Blackledge* and *Menna* have been strictly narrowed to their facts, with no possibility of other constitutional claims surviving a plea.

This Court should grant the petition and hold that *Blackledge* and *Menna* did not announce a *sui generis* rule lacking any underlying principle. Rather, the rationale of those cases extends directly to claims that the statute of conviction is unconstitutional, whether framed as a facial or an as-applied challenge. Accordingly, the D.C. Circuit erred by refusing to consider the merits of Petitioner's constitutional claims.[10]

* * *

This case directly presents a recurring issue on which the circuit courts are deeply split and which is of

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[10] Likewise erroneous are the circuits that allow facial—but not as-applied—challenges to survive. *See* Part I.C, *infra*. That distinction makes little sense given that *Blackledge* and *Menna* themselves involved as-applied challenges. 417 U.S. at 30; 423 U.S. at 61-62. Also, this Court stated in *Broce* that a *Blackledge/Menna* claim could be based on *either* the face of the indictment *or* the "existing record" at *"the time the plea was entered,"* indicating that the circuit court must consider the particular facts proffered at the district court. *Broce*, 488 U.S. at 575 (emphasis added). Further, this Court has made clear that the "distinction between facial and as-applied challenges is not so well defined that it has some automatic effect." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Finally, such a rule would encourage defendants to needlessly raise facial challenges rather than narrower as-applied ones, in direct contravention of this Court's dictate that facial challenges "run contrary to the fundamental principle of judicial restraint" because they ask the court to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quotation marks omitted).

significant importance to the orderly and predictable operation of the federal criminal justice system. The Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE

v. No. 15-3015

RODNEY CLASS,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cr-00253-1)

Before: GRIFFITH and SRINIVASAN, Circuit Judges, and SENTELLE, Senior Circuit Judge.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties and oral arguments of counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and ADJUDGED that the judgment of the district court be affirmed.

Appellant Rodney Class pleaded guilty in the district court to possession of a firearm on Capitol grounds in violation of 40 U.S.C. § 5104(e). Although the defendant appeared pro se at the time of the plea, he had previously been represented by appointed counsel and counsel had been discharged at his request, although the Federal Public Defender served as stand-by or advisory counsel. Despite his sometime lack of counsel, the plea followed extended motions practice and was memorialized in a plea agreement.

The district court conducted a full inquiry pursuant to Federal Rule of Criminal Procedure 11. That inquiry included the following exchange:

THE COURT: If you went to trial and you were convicted, you would have a right to appeal your conviction to the Court of Appeals and to have a lawyer help you prepare your appeal. Do you understand that?

[APPELLANT]: Yes.

THE COURT: Do you know what I mean by your right to appeal?

[APPELLANT]: Yeah. Take it to the next court up.

THE COURT: All right.

Now, by pleading guilty, you would be generally giving up your rights to appeal. Do you understand that?

[APPELLANT]: Yes.

THE COURT: Now, there are exceptions to that.

You can appeal a conviction after a guilty plea if you believe that your guilty plea was somehow unlawful or involuntary or if there is some other fundamental defect in these guilty-plea proceedings.

You may also have a right to appeal your sentence if you think the sentence is illegal. Do you understand those things?

[APPELLANT]: Yeah. Pretty much.

THE COURT: Now, if you plead guilty in this case and I accept your guilty plea, you'll give up all of the rights I just explained to you, aside from the exceptions that I mentioned, because there will not be any trial, and there will probably be no appeal. Do you understand that?

[APPELLANT]: Yes.

Tr. of Plea Hearing at 16:2-17:4, *United States v. Class*, No. 13-253-RWR-1 (D.D.C. Nov. 21, 2014).

On appeal, Class attempts to assert three grounds of constitutional error and a further claim of statutory error. None of them are properly before us.

It is well-established law that "[u]nconditional guilty pleas that are knowing and intelligent . . . waive the pleading defendant['s] claims of error on appeal, even constitutional claims." *United States v. Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004). Although the Federal Rules of Criminal Procedure provide for

conditional pleas wherein a pleading defendant may "reserv[e] in writing the right to have an appellate court review an adverse determination of a specified pretrial motion," Fed. R. Crim. P. 11(a)(2), the defendant's plea in the present case contains no such reservation.

The plea agreement included an explicit waiver of appeal rights as to sentencing errors and collateral attacks on the conviction, but not as to alleged errors in the indictment or in proceedings before the sentencing. Appellant apparently believes that the lack of an explicit waiver permits him to proceed in the present appeal. He is in error. The holding from *Delgado-Garcia* quoted above reflects the universally-recognized law of the United States. *See, e.g., Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973).

There are two recognized exceptions to this rule: "the defendant's claimed right not to be haled into court at all," and a claim "that the court below lacked subject-matter jurisdiction over the case . . . ." *Delgado-Garcia*, 374 F.3d at 1341 (citations and internal quotation marks omitted). Neither claimed exception applies here. We therefore affirm the judgment of the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CR No. 13-253-RWR-1
	)	
vs.	)	Washington, D.C.
	)	October 27, 2014
RODNEY CLASS,	)	10:00 a.m.
	)	
Defendant.	)	
	)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE RICHARD W. ROBERTS

APPEARANCES:

For the Government:

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* * * * *

Mr. Class moves to dismiss the criminal case against him and alleges that the charges against him are invalid under the Second Amendment to the United States Constitution. And he seeks the removal of his GPS tracking device.

His second motion docketed as No. 35, challenging the charges against him under the Second Amendment, is captioned as "Judicial Notice Motion To Remove U.S. Code 28, Section 2672 Administrative Adjustment of Claims."

I will construe his pro se motions liberally, as I must, and will treat them as a challenge to the remaining federal count, since the D.C. Code charge is no longer in the case.

Mr. Class contends, in essence, that the holdings in three cases: *District of Columbia versus Heller*, reported at 554—I'm sorry, 554 U.S. 570 in 2008, and *McDonald versus Chicago*, reported at 561 U.S. 742 in 2010, and *Parker versus District of Columbia*, reported at 478 F.3d 370 by the D.C. Circuit in 2006, all require that the charge against him be dismissed.

The Second Amendment to the U.S. Constitution provides that a well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

In the *Heller* case, the Supreme Court held that the D.C. gun statute restrictions violated an individual's Second Amendment right to keep and bear arms.

Although the Supreme Court held the D.C. gun law unconstitutional, that court was careful in emphasizing that nothing in our opinion should be taken to cast doubt on longstanding laws forbidding the carrying of firearms in sensitive places such as schools and government buildings. Importantly, the Court stressed that such laws are presumptively lawful, regulatory measures.

In *Heller*, too, decided by the D.C. Circuit in 2011 and reported at 670 F.3d 1244, the D.C. Circuit adopted a two-part test to assist courts in deciding the Second Amendment challenges to gun control statues.

Under the two-step test, a reviewing court will be required to ask first whether a particular provision impinged upon a right protected by the Second Amendment. And if it does, then the Court has to determine whether the provision passes muster under the appropriate level of constitutional scrutiny.

A longstanding statutory restriction is presumed to be lawful or presumed not to burden conduct within the scope of the Second Amendment. A plaintiff can rebut this presumption by showing the regulation does not have more than a de minimis effect on his right.

To determine whether the particular gun control law may be upheld, the D.C. Circuit concluded that intermediate scrutiny was the appropriate level of scrutiny. To pass muster under intermediate scrutiny, the government has to show that the restrictions are substantially related to an important governmental objective. Now, under this showing, the government would be required to establish a tight fit between the restrictions and an important or substantial

governmental interest, a fit that employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective.

Because the Supreme Court determined, in *Heller*, that laws prohibiting individuals from carrying firearms in sensitive places, such as government buildings, are presumptively lawful, regulatory measures, Mr. Class would have to rebut this presumption by showing that there was more than a de minimis effect on his exercise of his Second Amendment right. But he has not provided any evidence to rebut the presumption that Section 5104(e)(1) does not burden conduct protected by the Second Amendment.

From as best I can decipher from what he files in his motions, he asserts only that the District of Columbia city code, quote/unquote, "is unconstitutional," and then he cites to those three cases: Heller, McDonald and Parker.

Although his motions have been construed generously, he would have to provide more than bold assertions to support his Second Amendment claim against the federal statute. And so his motions, that's Nos. 20 and 35, challenging the charge against him on Second Amendment grounds, are denied.

* * * * *

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Crim. Action
	)	No. 13-253 (GK)
RODNEY CLASS,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER

Pending before the Court are thirty-six Motions filed by Defendant Rodney Class [Dkt. Nos. 7, 10-14, 16, 20-22, 23, 25-49]. Upon consideration of the Motions, the Government's three Omnibus Responses, the arguments presented at the Motions Hearing on April 7, 2014, and the entire record herein, and for the reasons set forth below, Defendant's Motions are **granted in part, denied in part**, and, pending further development of the record, **deferred in part**.

I. BACKGROUND

On May 30, 2013, Defendant was arrested by United States Capitol Police for possession of three firearms on United States Capitol Grounds. *See* Indictment [Dkt. No. 1].[1]

On September 3, 2013, a grand jury in the United States District Court for the District of Columbia indicted Defendant on two charges: (1) possession of three firearms on United States Capitol Grounds in violation of 40 U.S.C. § 5104(e)(1); and (2) carrying a concealed pistol outside of his home or business place in violation of D.C. Code § 22-4504(a).[2] On September 5, 2013, Defendant appeared before Magistrate Judge John Facciola for arraignment. The Federal Defender for the District of Columbia was appointed to represent him and he was released on his own recognizance and placed in the Court's High Intensity Supervision Program.[3]

Subsequently, Defendant indicated through written filings and oral requests at several court appearances that he wished to represent himself. On March 26, 2014,

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[1] Defendant is alleged to have possessed a Taurus .44 caliber pistol, a Ruger LC9 9 mm pistol, and a Henry Arms .44 caliber rifle. *See* Indictment [Dkt. No. 1].

[2] On May 31, 2013, prior to the grand jury's indictment in this Court, Defendant was charged in the Superior Court for the District of Columbia with Carrying a Pistol in violation of D.C. Code § 22-4504(a). The case in Superior Court was eventually dismissed, but the record does not indicate when.

[3] On January 17, 2014, the case was reassigned to this Court after Judge Robert Wilkins, the District Judge previously assigned to the case, was elevated to the Court of Appeals for the D.C. Circuit.

the Court held a status conference at which it advised Defendant in great detail of the risks of self-representation in order to ensure that, in the event he ultimately elected to waive his constitutional right to appointed counsel, such election would be "knowing, intelligent, and voluntary." *United States v. Cunningham*, 145 F.3d 1385, 1391 (D.C. Cir. 1998). The Court then asked Defendant to further consider whether he wished to represent himself in light of the risks identified by the Court, and to inform the Court of his final decision at his next court appearance.

Meanwhile, between January 3, 2014, and March 27, 2014, Defendant, although still represented by counsel, filed thirty-six *pro se* Motions. [Dkt. Nos. 7, 10-14, 16, 20-22, 23, 25-49].[4] After he filed the first six of these Motions, the Court advised the Government at a status conference on February 3, 2014, that it could respond to the then-pending Motions with a single omnibus response indicating merely whether it opposed or did not oppose the requested relief. On February 7, 2014, the Government filed an Omnibus Response to the first six of these Motions ("Gov't's First Omnibus Resp.") [Dkt. No. 17]. On March 7, 2014, after Defendant filed additional Motions, the Government filed a second Omnibus Response to four more of his Motions ("Gov't's

---

[4] Subsequently, Defendant submitted four additional Motions that were entirely repetitious of his other Motions. Because all of these Motions were submitted *pro se*, Defendant was required to obtain the Court's permission before they could be filed on the docket. The Court granted permission to file Defendant's first thirty-six Motions, but denied him permission to file the four additional Motions that were duplicative of the first thirty-six.

Second Omnibus Resp.") [Dkt. No. 24]. On April 4, the Government filed a third Omnibus Response to the remainder of Defendant's Motions ("Gov't's Third Omnibus Resp.") [Dkt. No. 51].

Defendant did not file any formal Replies in further support of his Motions, despite being advised by the Court at a status conference on February 27, 2014, that he had a right to do so. He did, however, file various submissions styled as "objections" to the Government's Omnibus Responses. These submissions address the Government's various Omnibus Responses but also raise new arguments and requests for relief. *See* Dkt. Nos. 28, 32, 36. As a result, the Court shall treat them as independent "Motions," but shall also consider them in further support of each of Class's other Motions.

On April 7, 2014, the Court held a Motions Hearing at which Defendant presented argument on his Motions. He also informed the Court at that time that, having considered the risks of self representation, he still desired to waive his right to appointed counsel and proceed *pro se*. The Court accepted Defendant's waiver as knowing and voluntary, granted his request to proceed *pro se*, and appointed the Federal Defender, A.J. Kramer, as stand-by advisory counsel. The Government elected not to present any substantive argument on Defendant's Motions but requested the opportunity to submit additional briefing in the event the Court was inclined to grant any of the Motions.

At the conclusion of the Motions Hearing, in light of the voluminous submissions Defendant had already filed, the Court issued an Order requiring Defendant to seek express permission from the Court prior to filing

any additional Motions. *See* Order dated April 7, 2014 [Dkt. No. 52].

II. DISCUSSION

The Court construes Defendant's Motions liberally for any possible relief to which he might be entitled. *See, e.g., Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583 (D.C. Cir. 2002) (court has an "obligation to construe pro se filings liberally"). It observes, however, that although Defendant raises a few issues that bear further consideration, a number of his Motions are duplicative of each other, and many are, to a large extent, utterly incomprehensible. Furthermore, most of the Motions purport to cite legal principles that either do not exist or are provisions of civil law wholly inapplicable to the issues in this criminal case. With this background in mind, the Court addresses each Motion as follows.[5]

* * * * *

8. **Requirement for Judicial Notice: Motion and Requirement to Quash Plaintiff's Latest Response and a Requirement to Dismiss All Charges for Lack of Direct Rebuttal of Court Ordered Subject Matter, Lack of Standing, Frivolous Filings, and Failure to Produce a *Corpus Delicti* [Dkt. No. 20] ("Motion #8")**

In this Motion, Defendant seeks to quash the Government's First Omnibus Response on the basis that

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[5] In listing Defendant's Motions, the Court retains the exact spelling and capitalization used by Defendant.

he does not deem it responsive to his Motions. At the status conference on February 3, 2014, the Court expressly advised the Government that it could respond to Defendant's numerous Motions in summary fashion, and therefore, the summary nature of Defendant's First Omnibus Response is not a basis to "quash" the Response. As discussed in more detail below, however, the Government shall be directed to submit further briefing on certain issues raised by Defendant's Motions.

To the extent Defendant challenges the Government's "standing" to bring this case, the United States Attorney's Office for the District of Columbia has the authority to prosecute crimes against the United States and the District of Columbia. *See* Fed. R. Crim. P. 1(b)(1)(B).

To the extent Defendant challenges the prosecutor's competence and alleges malicious prosecution, he provides absolutely no support for these allegations.

To the extent Defendant argues that the criminal provisions under which he is charged, 40 U.S.C. § 5104(e) and 22 D.C. Code § 4504(a), apply only to business entities, government instrumentalities and other corporate "persons," but not to natural persons such as himself, this argument is contradicted by the plain language of the laws under which he is charged. Only natural persons are capable of "carry[ing]" a firearm in the manner prohibited. *See* 40 U.S.C. § 5104(e) ("An individual or group of individuals . . . *may not carry* on or have readily accessible to any individual on the Grounds or in any of the Capitol Buildings a firearm [or] a dangerous weapon[.]") (emphasis added); 22 D.C. Code § 4504(a) ("No person *shall carry* within the District of

Columbia either openly or concealed on or about their person, a pistol or any deadly or dangerous weapon[.]") (emphasis added). Moreover, Section 5104(e) explicitly refers to an "individual or group of individuals," thereby making clear that its prohibitions apply to a natural person such as Defendant, and not a corporate person.[6]

* * * * *

Finally, to the extent Defendant challenges his prosecution under the Second Amendment of the Constitution, the Government has not submitted a substantive response to this argument. The Court therefore lacks an adequate record on which to evaluate it. The Government shall be ordered to file further briefing on this issue no later than **May 1, 2014**, and the Defendant may, but is not required to, file a further Response within **14 days** of the Government's submission.

For the foregoing reasons, Defendant's Motion shall be **deferred** insofar as it relates to the Second Amendment and otherwise shall be **denied**.

* * * * *

/s/ Gladys Kessler

April 16, 2014 United States District Judge

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[6] As support for his argument that the criminal provisions at issue do not apply to natural persons, Defendant relies on portions of the United States Tax Code, the Texas Administrative Code and Delaware Administrative Code, all of which are inapplicable to this criminal case.

Appendix D

Constitutional and Statutory Provisions Involved

U.S. Const. amend. V:

No person shall be ... deprived of life, liberty, or property, without due process of law ...

40 U.S.C.A. § 5101

In this chapter, the term "Capitol Buildings" means the United States Capitol, the Senate and House Office Buildings and garages, the Capitol Power Plant, all buildings on the real property described under section 5102(c) (including the Administrative Building of the United States Botanic Garden) all buildings on the real property described under section 5102(d), all subways and enclosed passages connecting two or more of those structures, and the real property underlying and enclosed by any of those structures.

40 U.S.C. § 5102

(a) Legal description.--The United States Capitol Grounds comprises all squares, reservations, streets, roadways, walks, and other areas as defined on a map entitled "Map showing areas comprising United States Capitol Grounds", dated June 25, 1946, approved by the Architect of the Capitol, and recorded in the Office of the Surveyor of the District of Columbia in book 127, page 8, including all additions added by law after June 25, 1946.

(b) Jurisdiction.--

(1) Architect of the Capitol.--The jurisdiction and control over the Grounds, vested prior to July 31, 1946, by law in the Architect, is extended to the entire area of the Grounds. Except as provided in paragraph (2), the Architect is responsible for the maintenance and improvement of the Grounds, including those streets and roadways in the Grounds as shown on the map referred to in subsection (a) as being under the jurisdiction and control of the Commissioners of the District of Columbia.

(2) Mayor of the District of Columbia.--

(A) In general.--The Mayor of the District of Columbia is responsible for the maintenance and improvement of those portions of the following streets which are situated between the curblines of those streets: Constitution Avenue from Second Street Northeast to Third Street Northwest, First Street from D Street Northeast to D Street Southeast, D Street from First Street Southeast to Washington Avenue Southwest, and First Street from the north side of Louisiana Avenue to the intersection of C Street and Washington Avenue Southwest, Pennsylvania Avenue Northwest from First Street Northwest to Third Street Northwest, Maryland Avenue Southwest from First Street Southwest to Third Street Southwest, Second Street Northeast from F Street Northeast to C Street Southeast; C Street Southeast from Second Street Southeast to First Street Southeast; that portion of Maryland Avenue Northeast from Second Street Northeast to First Street Northeast; that portion

of New Jersey Avenue Northwest from D Street Northwest to Louisiana Avenue; that portion of Second Street Southwest from the north curb of D Street to the south curb of Virginia Avenue Southwest; that portion of Virginia Avenue Southwest from the east curb of Second Street Southwest to the west curb of Third Street Southwest; that portion of Third Street Southwest from the south curb of Virginia Avenue Southwest to the north curb of D Street Southwest; that portion of D Street Southwest from the west curb of Third Street Southwest to the east curb of Second Street Southwest; that portion of Washington Avenue Southwest, including sidewalks and traffic islands, from the south curb of Independence Avenue Southwest to the west curb of South Capitol Street.

(B) Repair and maintenance of utility services.--The Mayor may enter any part of the Grounds to repair or maintain or, subject to the approval of the Architect, construct or alter, any utility service of the District of Columbia Government.

(c) National Garden of the United States Botanic Garden.--

(1) In general.--Except as provided under paragraph (2), the United States Capitol Grounds shall include--

(A) the National Garden of the United States Botanic Garden;

(B) all grounds contiguous to the Administrative Building of the United States Botanic Garden, including Bartholdi Park; and

(C) all grounds bounded by the curblines of First Street, Southwest on the east; Washington Avenue, Southwest to its intersection with Independence Avenue, and Independence Avenue from such intersection to its intersection with Third Street, Southwest on the south; Third Street, Southwest on the west; and Maryland Avenue, Southwest on the north.

(2) Maintenance and improvements.– Notwithstanding subsections (a) and (b), jurisdiction and control over the buildings on the grounds described in paragraph (1) shall be retained by the Joint Committee on the Library, and the Joint Committee on the Library shall continue to be solely responsible for the maintenance and improvement of the grounds described in such paragraph.

(3) Authority not limited.--Nothing in this subsection shall limit the authority of the Architect of the Capitol under section 307E of the Legislative Branch Appropriations Act, 1989 (40 U.S.C. 216c).

(d) Library of Congress buildings and grounds.–

(1) In general.–Except as provided under paragraph (2), the United States Capitol Grounds shall include the Library of Congress grounds described under section 11 of the Act entitled "An Act relating to the policing of the buildings of the Library of Congress", approved August 4, 1950 (2 U.S.C. 167j).

(2) Authority of Librarian of Congress.--Notwithstanding subsections (a) and (b), the Librarian of Congress shall retain authority over the Library of Congress buildings and grounds in accordance with section 1 of the Act of June 29, 1922 (2 U.S.C. 141; 42 Stat. 715).

40 U.S.C. § 5104

(a) Definitions.--In this section--

(1) Act of physical violence.--The term "act of physical violence" means any act involving--

(A) an assault or other infliction or threat of infliction of death or bodily harm on an individual; or

(B) damage to, or destruction of, real or personal property.

(2) Dangerous weapon.--The term "dangerous weapon" includes--

(A) all articles enumerated in section 14(a) of the Act of July 8, 1932 (ch. 465, 47 Stat. 654); and

(B) a device designed to expel or hurl a projectile capable of causing injury to individuals or property, a dagger, a dirk, a stiletto, and a knife having a blade over three inches in length.

(3) Explosives.--The term "explosives" has the meaning given that term in section 841(d) of title 18.

(4) Firearm.--The term "firearm" has the meaning given that term in section 921(3) of title 18.

(b) Obstruction of roads.--A person may not occupy the roads in the United States Capitol Grounds in a manner that obstructs or hinders their proper use, or use the roads in the area of the Grounds, south of Constitution Avenue and B Street and north of Independence Avenue and B Street, to convey goods or merchandise, except to or from the United States Capitol on Federal Government service.

(c) Sale of articles, display of signs, and solicitations.--A person may not carry out any of the following activities in the Grounds:

(1) offer or expose any article for sale.

(2) display a sign, placard, or other form of advertisement.

(3) solicit fares, alms, subscriptions, or contributions.

(d) Injuries to property.--A person may not step or climb on, remove, or in any way injure any statue, seat, wall, fountain, or other erection or architectural feature, or any tree, shrub, plant, or turf, in the Grounds.

(e) Capitol Grounds and Buildings security.--

(1) Firearms, dangerous weapons, explosives, or incendiary devices.--An individual or group of individuals--

(A) except as authorized by regulations prescribed by the Capitol Police Board--

(i) may not carry on or have readily accessible to any individual on the Grounds or in any of the Capitol Buildings a firearm, a dangerous weapon, explosives, or an incendiary device;

(ii) may not discharge a firearm or explosives, use a dangerous weapon, or ignite an incendiary device, on the Grounds or in any of the Capitol Buildings; or

(iii) may not transport on the Grounds or in any of the Capitol Buildings explosives or an incendiary device; or

(B) may not knowingly, with force and violence, enter or remain on the floor of either House of Congress.

(2) Violent entry and disorderly conduct.--An individual or group of individuals may not willfully and knowingly--

(A) enter or remain on the floor of either House of Congress or in any cloakroom or lobby adjacent to that floor, in the Rayburn Room of the House of Representatives, or in the Marble Room of the Senate, unless authorized to do so pursuant to rules adopted, or an authorization given, by that House;

(B) enter or remain in the gallery of either House of Congress in violation of rules governing admission to the gallery adopted by that House or pursuant to an authorization given by that House;

(C) with the intent to disrupt the orderly conduct of official business, enter or remain in a room in any of the Capitol Buildings set aside or designated for the use of--

(i) either House of Congress or a Member, committee, officer, or employee of Congress, or either House of Congress; or

(ii) the Library of Congress;

(D) utter loud, threatening, or abusive language, or engage in disorderly or disruptive conduct, at any place in the Grounds or in any of the Capitol Buildings with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress;

(E) obstruct, or impede passage through or within, the Grounds or any of the Capitol Buildings;

(F) engage in an act of physical violence in the Grounds or any of the Capitol Buildings; or

(G) parade, demonstrate, or picket in any of the Capitol Buildings.

(3) Exemption of government officials.--This subsection does not prohibit any act performed in the lawful discharge of official duties by--

(A) a Member of Congress;

(B) an employee of a Member of Congress;

(C) an officer or employee of Congress or a committee of Congress; or

(D) an officer or employee of either House of Congress or a committee of that House.

(f) Parades, assemblages, and display of flags.--Except as provided in section 5106 of this title, a person may not-

(1) parade, stand, or move in processions or assemblages in the Grounds; or

(2) display in the Grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.

40 U.S.C. § 5109

(a) Firearms, dangerous weapons, explosives, or incendiary device offenses.--An individual or group violating section 5104(e)(1) of this title, or attempting to commit a violation, shall be fined under title 18, imprisoned for not more than five years, or both.

(b) Other offenses.--A person violating section 5103 or 5104(b), (c), (d), (e)(2), or (f) of this title, or attempting to commit a violation, shall be fined under title 18, imprisoned for not more than six months, or both.

(c) Procedure.--

(1) In general.--An action for a violation of this chapter or section 9, 9A, 9B, 9C or 14 of the Act of July 31, 1946 (ch. 707, 60 Stat. 719, 720), including an attempt or a conspiracy to commit a violation, shall be brought by the Attorney General in the name of the United States. This chapter and sections 9, 9A, 9B, 9C and 14 do not supersede any provision of federal law or the laws of the District of Columbia. Where the conduct violating this chapter or section 9, 9A, 9B, 9C or 14 also violates federal law or the

laws of the District of Columbia, both violations may be joined in a single action.

(2) Venue.--An action under this section for a violation of–

(A) section 5104(e)(1) of this title or for conduct that constitutes a felony under federal law or the laws of the District of Columbia shall be brought in the United States District Court for the District of Columbia; and

(B) any other section referred to in subsection (a) may be brought in the Superior Court of the District of Columbia.

(3) Amount of penalty.–The penalty which may be imposed on a person convicted in an action under this subsection is the highest penalty authorized by any of the laws the defendant is convicted of violating.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
DEC 20 2016
OFFICE OF THE CLERK

No. 16-424

In the Supreme Court of the United States

RODNEY CLASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to challenge the constitutionality of his statute of conviction on appeal, notwithstanding his voluntary and knowing entry of an unconditional guilty plea in which he did not seek to preserve any right to pursue such a challenge.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter. The district court's oral order denying petitioner's motion to dismiss the indictment (Pet. App. 6a-9a) is unreported. The district court's opinion and order deferring in part and denying in part petitioner's motion to dismiss the indictment (Pet. App. 10a-16a) is reported at 38 F. Supp. 3d 19.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2016. The petition for a writ of certiorari was filed on September 30, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Columbia, petitioner was

convicted on one count of unlawfully carrying and having readily accessible a firearm on Capitol grounds, in violation of 40 U.S.C. 5104(e)(1). C.A. App. 165. He was sentenced to 24 days of imprisonment, to be followed by 12 months of supervised release. *Id.* at 166-167. The court of appeals affirmed. Pet. App. 1a-5a.

1. On May 30, 2013, petitioner parked his car "in the 200 block of Maryland Avenue, S.W., Washington, D.C., which is part of the Capitol Grounds." C.A. App. 162. An agent of the United States Capitol Police observed that the car lacked authorization to park in the area. *Ibid.* Upon further inspection, the agent observed what she believed to be a large blade and a gun holster in the car. *Ibid.*

When petitioner returned to his car, he admitted that he had weapons in it. C.A. App. 162. After the agent obtained a search warrant, the police found, *inter alia*, a 9mm Ruger firearm loaded with eight rounds, including one round in the chamber; several loaded magazines containing 35 additional 9mm rounds; a box of 50 additional 9mm rounds; a .44 caliber Taurus firearm loaded with seven rounds, including one round in the chamber; an additional 90 rounds of .44 caliber ammunition; a .44 caliber Henry firearm loaded with 11 rounds, including one round in the chamber; and an additional 55 rounds of .44 caliber ammunition. *Id.* at 162-163.

2. A grand jury indicted petitioner on one count of unlawfully carrying or having readily accessible a firearm on Capitol Grounds, in violation of 40 U.S.C. 5104(e)(1); and one count of carrying a pistol in public, in violation of D.C. Code § 22-4504(a) (2012). Indictment 1-2. The latter charge was ultimately dismissed after the United States District Court for the District

of Columbia, in another case, held D.C. Code § 22-4504(a) to be unconstitutional. C.A. App. 122-123, 141; C.A. Supp. App. 134; see *Palmer* v. *District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

Petitioner, who eventually decided to waive his right to counsel, filed a number of pro se motions seeking, *inter alia*, dismissal of his case. Pet. App. 11a-16a. The district court denied most of his motions, but ordered a substantive response from the government "to the extent [petitioner] challenges his prosecution under the Second Amendment." *Id.* at 16a; see C.A. App. 70-100. At a subsequent motions hearing, the court "generously" construed petitioner's bare "assertions" that the D.C. city ordinance "'is unconstitutional'" as a Second Amendment challenge to the remaining count of carrying a firearm on Capitol Grounds, in violation of 40 U.S.C. 5104(e)(1). Pet. App. 9a; see *id.* at 7a. The court rejected that challenge, observing that this Court's decision in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), which had held a different D.C. gun law to be unconstitutional, had been "careful in emphasizing that nothing in [that] opinion should be taken to cast doubt on longstanding laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" and had "stressed that such laws are presumptively lawful, regulatory measures." Pet. App. 8a.

3. Petitioner subsequently entered an unconditional guilty plea, pursuant to a plea agreement, to the Section 5104(e)(1) count. Pet. App. 2a; C.A. App. 152-161. The plea agreement included a "Waivers" section, in which petitioner was informed that his guilty plea constituted an "agree[ment] to waive certain

rights afforded by the Constitution of the United States and/or by statute or rule." C.A. App. 156. The section describing the various "Trial Rights" that petitioner was waiving included "the right to appeal [a] conviction" had he been "found guilty after a trial." *Id.* at 156-157. The section describing petitioner's waiver of "Appeal Rights" included a specific "waive[r]" of "the right to appeal the sentence in this case * * * except to the extent" that the district court imposed a sentence "above the statutory maximum or guidelines range" that the court determined to be applicable. *Id.* at 157.

The district court, at petitioner's plea hearing, "conducted a full inquiry pursuant to Federal Rule of Criminal Procedure 11." Pet. App. 2a. During that colloquy, petitioner acknowledged that he understood he was "generally giving up [his] rights to appeal." *Ibid.*; see *id.* at 3a. The court then explained the "exceptions" to that general waiver rule, informing petitioner that he could "appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful or involuntary or if there is some other fundamental defect in the[] guilty-plea proceedings" and that he could appeal his sentence if he "th[ought] the sentence is illegal." *Id.* at 3a. Petitioner acknowledged that he understood the court's explanation. *Ibid.*

The district court accepted the plea, finding that petitioner "was competent and capable of making a decision, that he understood the nature and consequences of what he was doing, that he entered his plea knowingly and voluntarily and of his own free will, and that there was a factual basis for his entering a plea of guilty." C.A. Supp. App. 135. The court sentenced petitioner to 24 days of imprisonment, to be followed

by 12 months of supervised release. C.A. App. 166-167.

4. Petitioner appealed his conviction and filed a pro se opening brief, in which he appeared to raise, *inter alia*, a Second Amendment challenge to the D.C. ordinance that had formed the basis for a charge in the original indictment that had later been dismissed. See Pet. C.A. Br. 12-13, 23-26. A court-appointed amicus curiae filed a brief, whose arguments petitioner adopted, see Pet. 9 n.4, contending that the federal statute under which petitioner had been convicted "violates the Second Amendment, as applied to a law-abiding adult citizen's right to keep legally-owned firearms in his vehicle parked in an unsecured, publicly-accessible parking lot" and was "unconstitutionally vague" because it is "exceedingly difficult for someone to determine that the Maryland Avenue parking lot is part of the Capitol Grounds" and no proof of scienter is required. Amicus C.A. Br. 1, 51; see *id.* at 15-56.

The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-5a. The court perceived petitioner to be "assert[ing] three grounds of constitutional error and a further claim of statutory error," but found "[n]one of them" to be "properly before" the court on appeal. *Id.* at 3a. The court observed that "[a]lthough the Federal Rules of Criminal Procedure provide for conditional pleas wherein a pleading defendant may 'reserve in writing the right to have an appellate court review an adverse determination of a specified pretrial motion,'" *id.* at 3a-4a (brackets omitted) (quoting Fed. R. Crim. P. 11(a)(2)), petitioner's "plea in the present case contains no such reservation." *id.* at 4a. The court cited "well-established law that 'unconditional guilty pleas that

are knowing and intelligent waive the pleading defendant's claims of error on appeal, even constitutional claims.'" *Id.* at 3a (brackets and ellipsis omitted) (quoting *United States* v. *Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004)), cert. denied, 544 U.S. 950 (2005). And it determined that neither of the "two recognized exceptions to this rule"—namely, "'the defendant's claimed right not to be haled into court at all,' and a claim 'that the court below lacked subject-matter jurisdiction over the case'"—"applies here." *Id.* at 4a (quoting *Delgado-Garcia*, 374 F.3d at 1341).

ARGUMENT

Petitioner contends (Pet. 12-31) that, notwithstanding his unconditional guilty plea, he was entitled to challenge the constitutionality of his statute of conviction on appeal. The court of appeals' unpublished disposition is correct; this case would be a poor vehicle for reviewing the question presented; and no further review is warranted. This Court recently denied a petition for a writ of certiorari presenting similar issues, see *Parrilla-Fuentes* v. *United States*, No. 16-5055 (Nov. 14, 2016), and should do the same here.[1]

1. Petitioner's unconditional guilty plea bars him from challenging the constitutionality of his statute of conviction on appeal. "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *United States* v. *Broce*, 488 U.S. 563, 570 (1989). Accordingly, "[w]hen a criminal defendant has solemnly admitted in open court

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[1] The petitions in *Carrasquillo-Peñaloza* v. *United States*, No. 16-6076 (filed Sept. 19, 2016), and *Muhlenberg* v. *United States*, No. 16-6135 (filed Sept. 20, 2016), present similar questions.

that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). Even apart from any view of the guilty plea as a "waiver" of constitutional claims, *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam), the defendant's admissions preclude any argument inconsistent with the premise that he violated the substantive criminal law as described in the indictment. See *Broce*, 488 U.S. at 570-571; *Brady* v. *United States*, 397 U.S. 742, 748 (1970) ("[T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial.").

The Federal Rules of Criminal Procedure additionally make clear that, in the federal system, "traditional, unqualified pleas *do* constitute a waiver of nonjurisdictional defects." Fed. R. Crim. P. 11 advisory committee's note (1983) (emphasis added). Under Rule 11(a)(2), a defendant may, with the consent of the court and the government, "enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2). That Rule was added, in part, to "aid in clarifying" that an unconditional plea would be treated as waiving nonjurisdictional arguments. Fed. R. Crim. P. 11 advisory committee's note (1983). In accordance with that principle, petitioner's plea colloquy here included his acknowledgement that an unconditional guilty plea meant "generally giving up [his] rights to appeal," except for claims that the "guilty plea was somehow unlawful or involuntary,"

that the "guilty-plea proceedings" exhibited "some other fundamental defect," or that "the sentence [was] illegal." Pet. App. 2a-3a.

2. Petitioner does not dispute that both the statutory right to appeal, and constitutional claims more generally, are subject to waiver. See, *e.g.*, *United States* v. *Mezzanatto*, 513 U.S. 196, 200-201 (1995) (defendant may waive "many of the most fundamental protections afforded by the Constitution"). Nor does he dispute that an unconditional guilty plea in most circumstances bars a defendant from challenging his conviction or sentence on direct appeal. He contends (Pet. 26-31), however, that the bar should not apply to a constitutional challenge to the statute of conviction. In his view, the success of such a challenge would imply a right "to prevent a trial from taking place at all," Pet. 28, and this case should therefore be controlled by two decisions—*Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, *supra*—in which this Court permitted a defendant who unconditionally pleaded guilty to challenge the prosecution's authority to "hal[e] [the] defendant into court." *Menna*, 423 U.S. at 62 & n.2; see *Blackledge*, 417 U.S. at 30-31.

Petitioner's argument is misconceived. "In *Blackledge* and *Menna*, * * * the very act of haling the defendants into court completed the constitutional violation." *United States* v. *Miranda*, 780 F.3d 1185, 1190 (D.C. Cir. 2015). *Blackledge* involved a claim of vindictive prosecution based on increased charges, the premise of which was that "[t]he very initiation of the proceedings against [the defendant] in the Superior Court * * * operated to deny him due process of law." 417 U.S. at 30-31. Similarly, *Menna* involved a double-jeopardy claim, the premise of which was that

the State was "precluded by the United States Constitution from haling [the] defendant into court on [the] charge." 423 U.S. at 62. "Neither *Blackledge* nor *Menna* involved claims that a criminal statute violated the Constitution," and such a claim does not "fit into *Blackledge* and *Menna*'s exception for claims involving 'the very power of the State to bring the defendant into court.'" *United States* v. *De Vaughn*, 694 F.3d 1141, 1154 (10th Cir. 2012) (quoting *Blackledge*, 417 U.S. at 30), cert. denied, 133 S. Ct. 2383 (2013). This Court has recognized that a district court is "authorized to render judgment on the indictment" even when the charges in the indictment are legally defective. *United States* v. *Williams*, 341 U.S. 58, 66 (1951); see *id.* at 61.

This Court has, in particular, made clear that the constitutionality of the statute under which a defendant is charged and convicted is not a question of subject-matter jurisdiction. Subject-matter jurisdiction relates to the court's "power to decide a justiciable controversy," *Williams*, 341 U.S. at 66 (citation omitted), not Congress's power to enact a statute. As this Court has explained, "[e]ven the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction." *Ibid.* "Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional, * * * it has proceeded with jurisdiction." *Id.* at 68-69; see *Chicot Cnty. Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 373-378 (1940) (according res judicata effect to decision notwithstanding that statute under which court acted was subsequently found unconstitutional).

Petitioner's citation (Pet. 28-29) of *Haynes* v. *United States*, 390 U.S. 85 (1968), is misplaced. In *Haynes*, a

defendant had raised in district court, before pleading guilty, an as-applied constitutional challenge to the statute under which he had been charged, and the Court permitted the renewal of that challenge on appeal. See *id.* at 86-87 & n.2. The government did not challenge that procedure, however, and the Court did not analyze it beyond citing a court of appeals decision. *Haynes*, moreover, predates the enactment of Rule 11(a)(2), which provides explicit procedures for conditional appeals and clarifies that "traditional, unqualified pleas do constitute a waiver of nonjurisdictional defects." Fed. R. Crim. P. 11 advisory committee's note (1983). The drafters of that Rule recognized that this Court had held that "certain kinds of constitutional objections may be raised after a plea of guilty" under "the Menna-Blackledge doctrine" and stated that the conditional plea procedures did not affect or apply to that doctrine. *Ibid.* (amendment "should not be interpreted as either broadening or narrowing the Menna-Blackledge doctrine"). But they also made clear that merely raising an objection—even a constitutional one outside the scope of *Menna* and *Blackledge*—does not preserve the right to raise it on appeal following a guilty plea unless the prescribed procedures for a conditional plea are observed. See Fed. R. Crim. P. 11(a)(2).[2]

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[2] Petitioner's passing citation (Pet. 29) of *Halbert* v. *Michigan*, 545 U.S. 605, 621-622 (2005), is also misplaced. That case concerned a right to counsel in appellate proceedings and did not address the question presented here. See *id.* at 609-610. The quotation in the petition, moreover, is not a "holding" (Pet. 29) of this Court, but instead a restatement of a passage from a dissenting opinion by a state-court judge discussing state convictions. See *Halbert*, 545 U.S. at 621-622 (quoting *People* v. *Bulger*, 614 N.W.2d

3. The court of appeals' conclusion (Pet. App. 3a-4a) that constitutional challenges to the statute of conviction may not be raised on appeal following an unconditional guilty plea accords with the decisions of other circuits. See *United States* v. *Díaz-Doncel*, 811 F.3d 517, 518 (1st Cir. 2016) ("[A] constitutional challenge to Congress's 'jurisdiction' to pass [a statute] pursuant to its Article I powers is not a challenge to a district court's subject matter jurisdiction over a criminal case brought under [that statute]."); *De Vaughn*, 694 F.3d at 1153 ("A claim that a criminal statute is unconstitutional does not implicate a court's subject matter jurisdiction.").

Some circuits have at least in certain circumstances permitted a federal criminal defendant to raise a constitutional challenge to a criminal statute underlying the charges to which he has pleaded guilty, based on the view that the constitutional argument is "jurisdictional." See, *e.g.*, *United States* v. *Saac*, 632 F.3d 1203, 1208 (11th Cir.) (facial challenge), cert. denied, 132 S. Ct. 139 (2011); *United States* v. *Seay*, 620 F.3d 919, 922 (8th Cir. 2010) (facial challenge), cert. denied, 562 U.S. 1191 (2011); *United States* v. *Whited*, 311 F.3d 259, 262-264 (3d Cir. 2002) (as-applied challenge), cert. denied, 538 U.S. 1065 (2003); *United States* v. *Rodia*, 194 F.3d 465, 469 (3d Cir. 1999) (facial challenge), cert. denied, 529 U.S. 1131 (2000); *United States* v. *Bishop*, 66 F.3d 569, 572 n.1 (3d Cir.) (facial challenge), cert. denied, 516 U.S. 1032 (1995) and 516 U.S. 1066 (1996); *United States* v. *Skinner*, 25 F.3d 1314, 1317 (6th Cir. 1994) (facial challenge); *United States* v. *Sandsness*, 988 F.2d 970, 971 (9th Cir. 1993)

103, 133-134 (Mich.), cert. denied, 531 U.S. 994 (2000) (Cavanaugh, J., dissenting)).

(citing *United States* v. *Broncheau*, 597 F.2d 1260, 1262 n.1 (9th Cir.) (stating that guilty plea "does not bar appeal of claims that the applicable statute is unconstitutional") (facial and as-applied challenges), cert. denied, 444 U.S. 859 (1979)); see also *United States* v. *Bell*, 70 F.3d 495, 497 (7th Cir. 1995) (permitting facial challenge "in the circumstances of this case").[3] None of those decisions, however, has reconciled the view that the constitutionality of the statute of conviction is "jurisdictional" with the contrary authority from this Court, see p. 9, *supra*.

The Seventh Circuit has stated that it uses the term "jurisdictional" in this context not in reference to subject-matter jurisdiction, but as shorthand for any issue "that stands in the way of conviction—even when factual guilt is validly established—and prevents a court from entering any judgment in the case, including an acquittal." *United States* v. *Phillips*, 645 F.3d

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[3] Petitioner's citation of unpublished circuit decisions—particularly ones in which the issue was not disputed, see *United States* v. *Araudu*, 612 Fed. Appx. 177, 178 n.1 (4th Cir. 2015)—does not demonstrate any established circuit practice that would bind future circuit panels. Petitioner also fails to show such a practice by citing (Pet. 18) *United States* v. *Knowles*, 29 F.3d 947 (5th Cir. 1994). That decision, which permitted a constitutional challenge to a statute of conviction following an unconditional guilty plea, is at odds with a later decision from the same circuit, *United States* v. *Sealed Appellant*, 526 F.3d 241 (5th Cir.), cert. denied, 555 U.S. 1009 (2008), which found a constitutional challenge to be waived by an unconditional guilty plea on the ground that the challenge was nonjurisdictional. Compare *Sealed Appellant*, 526 F.3d at 243, with *Knowles*, 29 F.3d at 952. Although the Fifth Circuit follows the earlier panel decision in the event of a conflict, *GlobeRanger Corp.* v. *Software AG USA, Inc.*, 836 F.3d 477, 497 (2016), the intracircuit conflict demonstrates that the issue is not fully settled in that court.

859, 862 (2011). The view that any such issue is appealable following an unconditional guilty plea, however, overreads *Blackledge* and *Menna*. See pp. 8-9, *supra*. Similarly, the Eleventh Circuit (in dictum) has attempted to justify permitting constitutional challenges on appeal by reference solely to this Court's decision in *Haynes*. See *United States* v. *Palacios-Casquete*, 55 F.3d 557, 561 (1995), cert. denied, 516 U.S. 1120 (1996). *Haynes*, however, cannot bear that much weight in this context. See pp. 9-10, *supra*. And neither the Seventh nor the Eleventh Circuit decisions discussed or accounted for Rule 11(a)(2).

Any approach that automatically permits review of a constitutional challenge to a statute of conviction notwithstanding an unconditional guilty plea is in tension with the fact that "virtually all circuits * * * have addressed constitutional challenges to criminal statutes and have either refused to address them because the defendants had neglected to raise them below, or decided to reach them only upon determining that the lower court's failure to address them constituted 'plain error,'" *United States* v. *Baucum*, 80 F.3d 539, 541 (D.C. Cir. 1996) (per curiam). See *id.* at 541 n.2 (citing cases). The disposition of such constitutional claims on waiver or plain-error grounds is not consistent with the view that such challenges raise questions of "the courts' statutory or constitutional *power* to adjudicate the case," which courts would be obligated to consider and required to review de novo. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); see *id.* at 93-102. That internal inconsistency in some circuits' practices should be addressed in the first instance by the courts of appeals themselves.

See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

4. In any event, the unpublished decision below would provide a poor vehicle for considering the question presented. First, petitioner is particularly ill-situated to contend that his guilty plea did not constitute a waiver of his constitutional claims. His pre-plea motions indicate that he was aware of the possibility of bringing such claims. See p. 3, *supra*. Yet he pleaded guilty notwithstanding the district court's warning that by doing so, he would generally be forgoing any appellate challenges to the conviction not directly tied to the plea itself, see Pet. App. 2a-3a. Although he indicated that he understood that warning, see *ibid.*, petitioner made no attempt to enter a conditional plea.[4]

Second, it is far from clear that petitioner is correct in suggesting (Pet. 25) that this case would provide the Court with the opportunity to address the question presented in the context of both as-applied and facial constitutional claims. Petitioner supports the assertion that both types of arguments were raised in the court of appeals by citing the amicus brief, whose arguments he adopted. See Pet. 25 n.8. That brief raised an as-applied Second Amendment claim, see Amicus C.A. Br. 1 (stating issue as whether petition-

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[4] Petitioner objects (Pet. 25) that Rule 11(a)(2) requires the government's consent to a conditional plea. But that requirement exists to "ensure that conditional pleas will be allowed only when the decision of the court of appeals will dispose of the case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence," something the government "is in a unique position to determine." Fed. R. Crim. P. 11 advisory committee's note (1983).

er's conviction "violates the Second Amendment, as applied"), and a vagueness argument focused primarily on whether the statute gave adequate notice that the *particular* parking lot used by petitioner was part of the Capitol Grounds, see *id.* at 50-56. Although the government's own brief apparently treated the vagueness argument as facial, Gov't C.A. Br. 26 n.14, it is not readily apparent that it should in fact be classified as such, or that the court of appeals itself viewed it that way. The court's unpublished decision in this case relied on precedent that (like its other published precedent) addresses only whether a defendant is barred from raising an as-applied constitutional challenge on appeal following an unconditional guilty plea. See *United States* v. *Delgado-Garcia*, 374 F.3d 1337, 1343 (D.C. Cir. 2004) (cited at Pet. 3a-4a), cert. denied, 544 U.S. 950 (2005); see also *Miranda*, 780 F.3d at 1189.

Third, petitioner's constitutional challenges to the ban on firearms on the Capitol Grounds are insubstantial. With respect to his Second Amendment claim, this Court explained in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), that "the right secured by the Second Amendment is not unlimited" and that "longstanding prohibitions on * * * the carrying of firearms in sensitive places such as schools and government buildings" are "presumptively lawful." *Id.* at 626, 627 n.26; see *McDonald* v. *City of Chi.*, 561 U.S. 742, 786 (2010) (same). Accordingly, courts of appeals have consistently rejected Second Amendment challenges like petitioner's. See, *e.g.*, *Bonidy* v. *United States Postal Serv.*, 790 F.3d 1121, 1125-1127 (10th Cir. 2015) (rejecting Second Amendment challenge to prohibition on firearms in parking lot adjacent to post

office), cert. denied, 136 S. Ct. 1486 (2016); *United States* v. *Masciandaro*, 638 F.3d 458, 460, 473-474 (4th Cir.), (rejecting Second Amendment challenge to conviction for possessing a firearm in a national-park parking lot), cert. denied, 132 S. Ct. 756 (2011).

With respect to petitioner's vagueness claim, he faces a particularly high hurdle, because he forfeited the claim by failing to raise it in district court. See Gov't C.A. Br. 29-31. He thus could prevail on appeal only if he satisfies the stringent requirements of plain-error review, see Fed. R. Crim. P. 52(b), including that any error was both "obvious" and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation and internal quotation marks omitted). Petitioner cannot show any obvious error—or, indeed, any error at all—in his conviction, when the term "Capitol Grounds" is clearly defined by statute to include "all grounds" bounded by certain streets, 40 U.S.C. 5102(c)(1)(C), thereby "provid[ing] a person of ordinary intelligence fair notice" of what is covered, *United States* v. *Williams*, 553 U.S. 285, 304 (2008). Nor can he show any fundamental unfairness in his conviction, when the parking lot in question is clearly marked as for permit-holders only and was chosen by petitioner specifically because it gave him ready access to congressional buildings. See Gov't C.A. Br. 5. Review of petitioner's procedural claim is unwarranted in a case in which his underlying merits arguments so clearly lack merit.

5. Not only is review unwarranted here because petitioner's underlying claims lack merit, but review is unwarranted to address any systemic concerns in

federal criminal justice.[5] The only cases that could even potentially be affected would be those in which a defendant has not expressly preserved his ability to raise a constitutional claim on appeal by entering a conditional plea under Rule 11(a)(2). Many of those, however, will involve written plea agreements with explicit appeal waivers that would independently bar a challenge to the statute of conviction on appeal, regardless of how the question presented in this case is resolved. See, *e.g.*, Br. in Opp. at 5-7, *Parrilla-Fuentes*, *supra* (No. 16-5055); Br. in Opp. at 5-8, *Muhlenberg* v. *United States*, No. 16-6135 (filed Sept. 20, 2016); compare *Menna*, 423 U.S. at 61-62 (double-jeopardy claim may be raised on appeal following unconditional guilty plea), with *Ricketts* v. *Adamson*, 483 U.S. 1, 8-10 (1987) (double-jeopardy claim may be expressly waived in plea agreement).

Of the remaining cases, it is highly unlikely that many defendants would ultimately benefit from the ability to challenge their statutes of conviction on direct review. In only one of the circuit decisions cited by petitioner (Pet. 17-23) as allowing a constitutional challenge to the statute of conviction on appeal following an unconditional guilty plea—*United States* v. *Knowles*, 29 F.3d 947 (5th Cir. 1994)—did the court of appeals actually reverse the conviction based on that challenge. And the court in that case noted that the recent circuit precedent on which it relied to find a

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[5] Petitioner does not claim that this Court's intervention to resolve the question presented would necessarily govern state practice. Although both *Menna* and *Blackledge* arose from state convictions, neither decision purported to displace the usual state prerogative to adopt rules to govern the proper presentation and preservation of federal claims following a guilty plea.

constitutional infirmity in the statute, *United States* v. *Lopez*, 2 F.3d 1342 (5th Cir. 1993), aff'd, 514 U.S. 549 (1995), would have justified relief (as a substantive rule) even on collateral postconviction review, see *Knowles*, 29 F.3d at 951. A defendant who seeks the benefit of a substantive ruling establishing that the statute of conviction is unconstitutional could accordingly seek relief under 28 U.S.C. 2255. The same is true of any defendant whose decision to plead was the product of counsel's erroneous failure to identify a substantial constitutional claim. See *Hill* v. *Lockhart*, 474 U.S. 52 (1985). The question whether a defendant who pleaded guilty unconditionally may himself raise a constitutional challenge to the statute of conviction through the particular mechanism of a direct appeal is accordingly of limited practical importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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January 3, 2017

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REPLY BRIEF FOR PETITIONER

The government concedes that the courts of appeals are squarely divided on the Question Presented, and also acknowledges that the D.C. Circuit's decision below rested solely on that issue. The government further agrees with Petitioner that this Court's directly-on-point holding in *Haynes v. United States*, 390 U.S. 85 (1968), is fully in accord with Petitioner's position. These concessions are more than enough to warrant a grant of a writ of certiorari here.

As discussed below, this case presents a uniquely strong vehicle through which the Court should resolve the circuit split regarding the correct interpretation of this Court's decisions in *Haynes*, *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), and thereby answer the unsettled question of whether a guilty plea inherently waives all constitutional challenges to the statute of conviction. This is an issue of great importance to the orderly and efficient operation of the criminal justice system.

I. The Government Concedes There Is A Circuit Split On The Question Presented.

1. The government concedes, as it must, that the courts of appeals are deeply split on the question of whether, by pleading guilty, a defendant inherently waives his right to challenge the constitutionality of his statute of conviction. *See* BIO 11-12. Citing the very same cases that Petitioner presented, *see* Pet. 15-17, the government notes that the D.C., First, and Tenth Circuits flatly forbid such challenges on appeal, *see* BIO

11. Again citing the same cases relied on by Petitioner, *see* Pet. 18-21, the government next acknowledges that the Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have ruled to the contrary and allow at least certain constitutional challenges to the statute of conviction, with the Seventh and Eighth Circuits distinguishing between facial and as-applied claims. *See* BIO 11-13.[1]

The government also concedes that the D.C. Circuit's decision below rested exclusively on this exact question, with the D.C. Circuit relying on its established precedent to hold that Petitioner's guilty plea inherently waived his right to raise any constitutional challenge to his statute of conviction. *See* BIO 5-6. The deep split presented by this case is more than enough on its own to warrant granting a writ of certiorari. *See* Sup. Ct. R. 10(a).

Not only does the government concede a well-developed split, but the government also asserts that the caselaw from six circuits is "contrary [to] authority from this Court." BIO 12; *see also id.* at 9, 11. The government claims that these circuits' decisions—which sometimes label certain constitutional challenges as "jurisdictional"—cannot be "reconciled" with this Court's caselaw indicating that the constitutionality of a criminal statute "is not a question of subject-matter

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[1] The government appears to dispute the precedential value of the Fifth Circuit's published decision in *United States v. Knowles*, 29 F.3d 947 (5th Cir. 1994), but the government later admits that the "Fifth Circuit follows the ... decision [in *Knowles*]" as binding. BIO 12 n.3.

jurisdiction." BIO 9. The government's allegation that numerous circuit courts are disregarding this Court's precedent regarding jurisdiction is yet another reason to grant certiorari here. *See* Sup. Ct. R. 10(c).

II. The Question Presented Is Important.

The government's arguments that the Court should not grant the writ despite the existence of the circuit split are meritless.

1. The government first suggests that this Court need not resolve the split because the 1983 amendments to Rule 11 of the Federal Rules of Criminal Procedure were meant to overrule circuit courts that had adopted Petitioner's interpretation of *Blackledge* and *Menna*. *See* BIO 7. That is wrong. Rule 11's commentary made clear that the modifications to Rule 11 "should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application," because Rule 11 "has no application to such situations." Fed. R. Crim. P. 11 Advisory Committee's Notes to 1983 Amendment; Pet. 24. Further, the government's own brief shows that the circuit split has arisen *after* 1983, defeating any implication that the modifications to Rule 11 somehow mooted or modified this issue. *See* BIO 11-13.

2. The government next argues that the circuit courts themselves should sort out the split. *See* BIO 13 (arguing that circuits' disagreements with this Court's precedent "should be addressed in the first instance by the courts of appeals themselves"). This makeweight

argument ignores the sheer number of circuits that would have to go *en banc* to reverse their binding decisions, given that there is, at a minimum, a 6-3 circuit split. The government's argument also completely misunderstands the nature of the split, which exists because the lower courts cannot agree on the correct interpretation of *this Court's* rulings in *Haynes*, *Blackledge*, and *Menna*. It is this Court's prerogative—not the circuits'—to clarify and re-interpret prior Supreme Court decisions. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997).

3. The government also argues that the Question Presented arises only in a rare set of circumstances and therefore is "of limited practical importance." BIO 17-18. This claim is completely defeated by the fact that the government's own brief cites no less than 15 on-point circuit cases issued just since 1993. *See* BIO 11-13.[2]

4. The government next asserts that the split is not worth resolving because defendants like Petitioner would perhaps lose on the merits of their underlying

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[2] To the extent the government suggests that future prosecutors can avoid this issue by drafting better plea agreements, *see* BIO 17, such an argument disregards the fact that several circuits hold that a facial challenge to a statute implicates the court's jurisdiction, *see* Pet. 20-21, meaning that such claims *cannot* be waived regardless of how artfully the government drafts its pleas. In any event, the government has been aware of this split for years and—as shown by this very case—prosecutors apparently have not become any more skilled at drafting their way around the split.

constitutional challenges *even if* they were permitted to raise them under *Blackledge/Menna*. *See* BIO 16-18. The government's argument is both irrelevant and wrong. Because the D.C. Circuit did not reach the merits below, the ultimate success of Petitioner's underlying constitutional claims is not before this Court. Rather, this Court is faced only with the narrow question of whether a constitutional challenge to a statute inherently survives a guilty plea—a question of great importance to the criminal justice system.

In any event, the government's argument disregards the significant collateral benefits of resolving the Question Presented. Establishing a uniform rule on which issues survive a guilty plea would promote a more efficient and orderly criminal justice system, thereby preserving scarce appellate court resources and providing predictability for defendants and prosecutors alike. Because of the current confusion over the interpretation of *Blackledge/Menna*, the courts often expend significant resources reviewing the parties' full merits briefs and then preparing for oral argument, resulting in a great drain of time even when the government ultimately "wins." Establishing a uniform national rule would ensure that proper claims (such as Petitioner's) receive full consideration, while improper claims are quickly dismissed, saving precious court resources. *See* Pet. 24.

Further, the government is incorrect to suggest that defendants like Petitioner will prevail less frequently than other criminal defendants. In fact, in the cases Petitioner cited where the circuit court

ultimately addressed the underlying constitutional merits, the defendant prevailed in over 7% of them—which is actually *higher* than the 4.8% overall reversal rate of federal convictions on direct appeal.[3] Considering that 95% of criminal convictions are obtained via guilty pleas, *see* Pet. 22, even a 7% success rate would equate to hundreds of meritorious claims that circuit courts are erroneously forgoing.[4]

This Court should grant the petition and establish a uniform and predictable national rule, which would benefit prosecutors, defendants, and the lower courts alike. *See* Pet. 23-24.

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[3] *Compare* Pet. 17-23 (citing *United States v. Knowles*, 29 F.3d 947, 952 (5th Cir. 1994)), *with* U.S. Courts, *U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits*, http://www.uscourts.gov/sites/default/files/data_tables/stfj_b5_630.2016.pdf (for 12-month period ending June 30, 2016, 573 criminal cases were reversed, out of 11,873 total criminal cases terminated).

[4] The government also suggests that constitutional challenges to the statute of conviction should be raised in a 28 U.S.C. § 2255 motion. *See* BIO 18. However, this would subject defendants to a Catch-22. On direct appeal, the government would argue that the constitutional claims can be raised only in habeas—and then when the defendant filed a habeas petition, the government would argue that the claims were procedurally improper because they had not been presented on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 504 (2003). The government's suggestion would also result in a further waste of judicial resources by forcing courts to address claims in a collateral setting that easily could have been resolved on direct appeal.

III. This Case Is An Excellent Vehicle.

The government's arguments about the suitability of this case to resolve the Question Presented are easily disposed of—and actually highlight that Petitioner's case is a superior vehicle because it lacks the procedural complications that plagued other cases raising a similar Question Presented.

1. The government first notes that this Court recently denied certiorari in *Parrilla-Fuentes v. United States*, No. 16-5055, 137 S. Ct. 474 (2016), and suggests that the Court "should do the same here." BIO 6. However, *Parrilla-Fuentes* is easily distinguishable. As the government's brief in opposition noted, the *Blackledge/Menna* issue was irrelevant in that case because the defendant's ability to appeal was independently barred by an express term in his guilty plea specifically waiving his right to directly appeal his underlying *conviction*. BIO 3, *Parrilla-Fuentes*, No. 16-5055 (U.S. Oct. 12, 2016).

That is not the case here. The D.C. Circuit correctly held that Petitioner's guilty plea "*lack[s]* ... an explicit waiver" of his right to directly appeal his conviction or the judgment against him. Pet.App.4a (emphasis added). That omission is especially important given that Petitioner's plea further contained an integration clause stating that there were no "understandings" or "promises" between Petitioner and the government "*other than those contained in writing herein.*" D.C. Cir. J.A.159 (emphasis added). The government never argues otherwise, and accordingly it is undisputed that

the terms of Petitioner's plea do *not* independently bar his constitutional challenges, unlike in *Parrilla-Fuentes*.[5]

2. Also unlike *Parrilla-Fuentes*, Petitioner's case presents properly preserved as-applied *and* facial challenges. *See* Pet. 25-26.[6] While conceding that Petitioner raised an as-applied Second Amendment challenge below, the government suggests that it is not "clear" whether Petitioner's separate vagueness challenge was facial. BIO 14-15. That is wrong. The government candidly admits that the "government's own brief [at the D.C. Circuit] apparently treated the vagueness argument as facial." BIO 15. The government cannot create a vehicle issue simply by attempting to disclaim its own prior position.

The government also argues that the vagueness challenge was not sufficiently briefed at the district court, though it concedes the issue was fully briefed in the D.C. Circuit. *See* BIO 16. The record does not

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[5] The two pending cases that the government cites are distinguishable for the same reason. *See* BIO 6 n.1. The guilty pleas in *Carrasquillo-Penaloza v. United States*, No. 16-6076 (U.S. Sept. 19, 2016), and *Muhlenberg v. United States*, No. 16-6135 (U.S. Nov. 23, 2016), both contained express waivers of the defendant's right to directly appeal their *convictions*. Pet. 2, *Carrasquillo-Penaloza*, No. 16-6076; BIO 3, *Muhlenberg*, No. 16-6135.

[6] *See* BIO 4, *Parrilla-Fuentes*, No. 16-5055. The government's other two cases likewise failed to preserve both types of challenges. *See* Pet. i, *Carrasquillo-Penaloza*, No. 16-6076; BIO 14, *Muhlenberg*, No. 16-6135.

support the government's theory. At the district court, Petitioner repeatedly argued that he had no clear warning as to the boundaries of the Capitol Grounds, *see* D.C. Cir. J.A.39, 65, and the government responded with numerous briefs attempting to explain why the incomprehensible language of the statute was actually "clear." *See, e.g.*, D.C. Cir. J.A.124, 130-38; Pet. 7.[7]

Accordingly, unlike the government's cases, Petitioner's case presents an excellent vehicle because it raises both facial and as-applied claims that were squarely before the lower courts, and (as the D.C. Circuit itself held) those claims are *not* independently barred by any waiver clause in Petitioner's guilty plea. *See* Pet.App.4a.

IV. The D.C. Circuit's Decision Was Contrary To This Court's Precedent.

The government spends the vast majority of its brief arguing the merits of the Question Presented, attacking the reasoning of the circuits that agree with Petitioner, while praising the circuits that disagree. *See* BIO 6-14. By focusing its fire so heavily on the merits, the government only highlights that the Question Presented is important and that Petitioner's case is an excellent vehicle through which to resolve it.

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[7] In any event, this Court would not need to address the merits of Petitioner's underlying constitutional challenges, which would be remanded for consideration in the first instance by the D.C. Circuit.

In any event, the government's discussion of the merits is off-base. It repeatedly ignores or dismisses this Court's precedent, offering a view of what the government believes the law should be, rather than what this Court has actually held.

1. As Petitioner argued, several circuits are ignoring this Court's decision in *Haynes v. United States*, 390 U.S. 85 (1968). This Court can resolve the split by granting the Petition and reaffirming the holding in *Haynes*, which is directly on point and *rejected* the government's position regarding waiver. *See* BIO 9-10. As the government admits, in *Haynes* "a defendant had raised in district court, before pleading guilty, an as-applied constitutional challenge to the statute under which he had been charged, and the [Supreme] Court permitted the renewal of that challenge on appeal." BIO 9-10.

Here, Petitioner likewise raised his constitutional challenges to the statute before he pleaded guilty, *see* Pet. 6-7, but the D.C. Circuit refused to consider Petitioner's constitutional claims, directly contrary to *Haynes*. The government never argues that this Court has overruled *Haynes*. The best the government can muster is that *Haynes* should not be followed because, in the government's opinion, this Court allegedly "did not analyze" the issue sufficiently before reaching its holding. BIO 10.[8] Needless to say, that is not a valid

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[8] The government also argues that *Haynes* pre-dates the modifications to Rule 11, *see* BIO 9-10, but again that argument disregards the fact that the circuit split has arisen after the Rule 11 modifications were issued in 1983. *See* Part II.1, *supra*. The

reason for lower courts to disregard the binding decision in *Haynes*.

2. The government next suggests that *United States v. Broce*, 488 U.S. 563 (1989), silently overruled or modified the *Blackledge/Menna* rule. *See* BIO 6-7. This suggestion is especially bewildering because *Broce* itself stated that the "decisions in *Blackledge* ... and *Menna* ... ha[ve] no application to the case at bar." *Broce*, 488 U.S. at 574. The government's theory also ignores the fact that the circuit split has intensified in the years *after* this Court issued *Broce*. *See* Pet. 15-21; BIO 11-13.

3. The government next tries to defend the D.C. Circuit's decision as being consistent with this Court's decisions in *Tollett v. Henderson*, 411 U.S. 258 (1973), and *Brady v. United States*, 397 U.S. 742 (1970), *see* BIO 6-7, but the government does not offer a single word in response to Petitioner's argument that *Menna* unequivocally rejected the D.C. Circuit's and the government's interpretation of *Tollett* and *Brady*: "Neither *Tollett* ... nor ... *Brady* ... stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations." *Menna*, 423 U.S. at 62 n.2; Pet. 27.

Adopting in full the D.C. Circuit's position, the government next claims that *Blackledge* and *Menna* do not apply here because in those cases, "'the very act of

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government also disregards the rule that lower courts are bound by this Court's decisions until this Court sees fit to overrule them. *Agostini*, 521 U.S. at 237-38.

haling the defendants into court completed the constitutional violation[s]'" of double jeopardy and vindictive prosecution, meaning the defendants did not even need to appear to defend themselves. BIO 8 (quoting *United States v. Miranda*, 780 F.3d 1185, 1190 (D.C. Cir. 2015)). The government fails to offer any response to Petitioner's argument refuting this exact point. *See* Pet. 30. Jeopardy does not attach merely because the government files a second indictment, and even a *successful* claim of vindictive prosecution does not relieve a defendant from his obligation to appear in court. *See id.* (citing *Crist v. Bretz*, 437 U.S. 28, 38 (1978); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 267-68 (1982)).

Accordingly, merely haling a defendant into court a second time cannot possibly "complete" a violation of the double jeopardy clause or amount to a successful claim of vindictive prosecution. The government's and D.C. Circuit's rationale is nothing more than an attempt to label *Blackledge* and *Menna* as *sui generis* decisions that lack any underlying rationale.

The correct inquiry under *Blackledge/Menna* is whether the defendant's claim—if successful—would forever prevent any trial from taking place. *See* Pet. 27-28. Petitioner's constitutional challenges easily meet that test, and accordingly he should have been allowed to raise them on appeal. *Id.* at 28.

* * *

The government concedes that the circuit courts are directly divided on the Question Presented and that the

D.C. Circuit below rested its holding solely on that same issue. Petitioner's case is a perfect vehicle because it raises both facial and as-applied claims, and also because Petitioner's guilty plea does *not* contain an independent waiver of his right to directly appeal his conviction. Pet.App.4a.

Resolving this split and providing a uniform rule will benefit not only defendants and the government, but also the lower courts themselves, which are in complete disarray about which constitutional challenges must receive full merits consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 12 2017
OFFICE OF THE CLERK

No. 16-424

In The Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT APPENDIX

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Petition For Certiorari Filed September 30, 2016
Certiorari Granted February 21, 2017

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NOTICE

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Appendix A

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Appendix B

Order Denying Petitioner's Motion To Dismiss The Indictment, *United States v. Class*, CR No. 13-253-RWR-1 (D.D.C. Oct. 27, 2014) 6a

Appendix C

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Appendix D

Constitutional and Statutory Provisions Involved 17a

U.S. District Court
District of Columbia (Washington, DC)
CRIMINAL DOCKET FOR
CASE #: 1:13-cr-00253-RWR All Defendants

Case title: USA v. CLASS Date Filed: 09/03/2013

Assigned to: Judge Richard W. Roberts

Appeals court case number: 15-3015

Date Filed	#	Docket Text
09/03/2013	1	INDICTMENT as to RODNEY CLASS (1) count(s) 1, 2. (hsj,) (Entered: 09/05/2013)
02/18/2014	20	MOTION and Requirement to Quash Plaintiff's Latest Response and a Requirement to Dismiss All Charges for Lack of Direct Rebuttal of Court Ordered Subject Matter, Lack of Standing, Frivolous Filings, and Failurwe to Produce Corpus Delicti by RODNEY CLASS. (hsj,) (Entered: 02/24/2014)
02/21/2014	22	MOTION for Requirement for an Article III Hearing for an Formal Complaiant of Ultra Vires Miss Behavior by RODNEY CLASS, (Attachments: # 1 Formal Complaint Notice of Felony) (hsj,) Modified on 3/27/2014 (hsj,). (Entered: 02/24/2014)
03/26/2014	27	MOTION *for Federal Rules Violations and Willful Fraud Upon The*

		Court As Grounds For Motion Of Dismissal, And A Request For Summary Judgment by RODNEY CLASS. "Leave to File Granted," Signed by Judge Gladys Kessler on 3/26/2014. (dr) (Entered: 03/27/2014)
03/26/2014	30	MOTION *for a Show Cause Hearing on Formal Complaint* by RODNEY CLASS. "Leave to File Granted," Signed by Judge Gladys Kessler on 3/26/2014. (dr) (Entered: 03/27/2014)
03/26/2014	35	MOTION to remove united states code 28 section 2672 administrative adjustment of claims by RODNEY CLASS. "Leave to file granted" by Judge Gladys Kessler on 3/26/14. (erd) (Entered: 03/27/2014)
03/26/2014	36	MOTION Objection to government's omnimbus response: Re: What the living flesh and blood man with a sould, a being/natural person, was subjected to after being unlawfully arrested by RODNEY CLASS. "Leave to file granted" by Judge Gladys Kessler on 3/26/14. (erd) (Entered: 03/27/2014)
04/07/2014	52	ORDER as to RODNEY CLASS, defendant, having knowingly and intelligently waived his right to

		counsel, shall be permitted to represent himself, and the Federal Defender, A.J. Kramer, is appointed as stand-by advisory counsel to the Defendant; no later than 4/15/2014, Defendant shall file any Opposition to the Government's Motion to Admit Other Crimes Evidence Pursuant to Rule 404(b) of the Federal Rules of Evidence, and Government shall file its Reply no later than 4/22/2014. Jury Trial set for 7/7/2014 at 09:30 AM in Courtroom 26A before Judge Gladys Kessler. SEE ORDER FOR ADDITIONAL DETAILS. Signed by Judge Gladys Kessler on 4/7/2014. (tth) (Entered: 04/07/2014)
04/16/2014	76	MEMORANDUM OPINION AND ORDER deferring ruling on 20 Motion to Quash as to RODNEY CLASS (1); denying 22 Motion for Requirement for an Article III Hearing for an Formal Complaiant of Ultra Vires Miss Behavior as to RODNEY CLASS (1); deferring ruling on 23 Motion to Take Judicial Notice Nunc Pro Tunc Requirement for an Article III Hearing for a Formal Complaint of Ultra Vires Misbehavior with Counterclaim; denying 25 Motion as to RODNEY CLASS (1); denying 26 Motion as to RODNEY CLASS (1); denying 27 Motion as to RODNEY CLASS (1);

denying 28 Motion as to RODNEY CLASS (1); denying 29 Motion as to RODNEY CLASS (1); denying 30 Motion as to RODNEY CLASS (1); denying 31 Motion as to RODNEY CLASS (1); denying 32 Motion as to RODNEY CLASS (1); denying 33 Motion as to RODNEY CLASS (1); denying 34 Motion as to RODNEY CLASS (1); deferring ruling on 35 Motion as to RODNEY CLASS (1); deferring ruling on 36 Motion as to RODNEY CLASS (1); denying 37 Motion for Discovery as to RODNEY CLASS (1); denying 38 Motion as to RODNEY CLASS (1); denying 39 Motion as to RODNEY CLASS (1); denying 40 Motion as to RODNEY CLASS (1); denying 41 Motion as to RODNEY CLASS (1); denying 42 Motion as to RODNEY CLASS (1); denying 43 Motion as to RODNEY CLASS (1); denying 44 Motion as to RODNEY CLASS (1); denying 45 Motion as to RODNEY CLASS (1); denying 46 Motion as to RODNEY CLASS (1); denying 47 Motion as to RODNEY CLASS (1); denying 48 Motion as to RODNEY CLASS (1); denying 49 Motion as to RODNEY CLASS (1); granting 10 Motion as to RODNEY CLASS (1); denying 11 Motion as to RODNEY CLASS (1); denying 7 Motion; granting in part and denying in part 12 Motion

as to RODNEY CLASS (1); granting 13 Motion as to RODNEY CLASS (1); denying 14 Motion as to RODNEY CLASS (1); denying 16 Motion as to RODNEY CLASS (1); Government's response to Defendant's Motion numbers 8, 11, 22, and 23 due no later than 5/1/2014; Defendant's reply to the Government's response due no later than 5/15/2014. Signed by Judge Gladys Kessler on 4/16/2014. (tth) (Entered: 04/16/2014)

05/01/2014 87 Memorandum in Opposition by USA as to RODNEY CLASS re 36 MOTION Objection to government's omnimbus response: Re: What the living flesh and blood man with a sould, a being/natural person, was subjected to after being unlawfully arrested, 44 MOTION to Take Judicial Notice Federal Rules Violations and Willful Fraud Upon the Court as Grounds for Motion of Dismissal and a Request for Summary Judgment, 23 MOTION, 35 MOTION to remove united states code 28 section 2672 administrative adjustment of claims, 20 MOTION to Quash (Attachments: # 1 Exhibit Ex. A, # 2 Exhibit Ex. B, # 3 Exhibit Ex. C)(Lallas, Peter) (Entered: 05/01/2014)

05/16/2014	93	NOTICE OF ATTORNEY APPEARANCE: A.J. Kramer appearing for RODNEY CLASS *Solely as Stand-By Counsel* (Kramer, A.J.) (Entered: 05/16/2014)
06/20/2014	117	ORDER scheduling trial for September 9, 2014 at 9:30 a.m. and vacating May 16, 2014 pre-trial order. Signed by Chief Judge Richard W. Roberts on 6/20/2014. (lcrwr3) (Entered: 06/20/2014)
08/04/2014	125	TRANSCRIPT OF PROCEEDINGS in case as to RODNEY CLASS before Judge Gladys Kessler held on 4-7-14; Page Numbers: 1-40. Date of Issuance:8-4-14. Court Reporter/ Transcriber Lisa M. Foradori, Telephone number 202-354-3269, Court Reporter Email Address : L4dori@hotmail.com. For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter.

		NOTICE RE REDACTION OF TRANSCRIPTS: The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at ww.dcd.uscourts.gov. Redaction Request due 8/25/2014. Redacted Transcript Deadline set for 9/4/2014. Release of Transcript Restriction set for 11/2/2014.(Foradori, Lisa) Modified on 8/5/2014 (mlp) (Entered: 08/04/2014)
08/20/2014	134	MOTION to Dismiss Count II by USA as to RODNEY CLASS. (Attachments: # 1 Text of Proposed Order)(Pearlman, Jeffrey) (Entered: 08/20/2014)
09/05/2014	137	ORDER granting Unopposed Motion 136 to Continue Trial. Signed by Chief Judge Richard W. Roberts on 9/5/2014. (lcrwr3) (Entered: 09/05/2014)

09/09/2014		Minute Entry; for proceedings held before Chief Judge Richard W. Roberts: Status Conference as to RODNEY CLASS held on 9/9/2014. Oral Ruling granting 134 Motion to Dismiss count 2 without prejudice. Status Conference set for 9/26/2014 at 12:00 PM in Courtroom 9 before Chief Judge Richard W. Roberts. Bond Status of Defendant: Personal Recognizance; Court Reporter: William Zaremba; Standby Defense Attorney: A.J. Kramer; US Attorney: Jeffrey Pearlman; (hs) (Entered: 09/09/2014)
09/09/2014		DISMISSAL OF COUNT 2 without prejudice, by Chief Judge Richard W. Roberts, on Oral Motion of the U.S.A. as to RODNEY CLASS. (mlp) (Entered: 09/09/2014)
09/23/2014	141	MOTION to Dismiss Count 2 by RODNEY CLASS. "Let This Be Filed" by Chief Judge Richard W. Roberts on 9/22/2014. (hsj,) (Entered: 09/24/2014)
10/08/2014	146	MOTION *for Jury Instruction on Intent* by USA as to RODNEY CLASS. (Pearlman, Jeffrey) Modified on 10/9/2014 (znmw,). (Entered: 10/08/2014)
10/21/2014	156	MOTION *FOR JURY INSTRUCTION ON CAPITOL GROUNDS* by USA as to RODNEY CLASS.

		(Attachments: # 1 Capitol Grounds Map, # 2 Text of Proposed Order) (Pearlman, Jeffrey) (Entered: 10/21/2014)
10/23/2014	157	SUPERSEDING INDICTMENT as to RODNEY CLASS (1) count 1s. (mlp) (Entered: 10/24/2014)
11/02/2014	168	PROFFER OF EVIDENCE by USA as to RODNEY CLASS (hs) (Entered: 11/24/2014)
11/04/2014		Minute Entry; for proceedings held before Chief Judge Richard W. Roberts: Arraignment as to RODNEY CLASS held on 11/4/2014. Not Guilty Plea entered as to Count 1s. Speedy Trial Time Excluded 11/4/14-11/6/14(XT). Status Conference set for 11/6/2014 at 10:30 AM in Courtroom 9 before Chief Judge Richard W. Roberts. Bond Status of Defendant: Committed/Commitment issued; Court Reporter: William Zaremba; Defense Attorney: PRO SE/A.J. Kramer Standby Counse; US Attorney: Jeffrey Pearlman; (hs) (Entered: 11/04/2014)
11/06/2014		Minute Entry; for proceedings held before Chief Judge Richard W. Roberts: Status Conference as to RODNEY CLASS held on 11/6/2014. Joint Oral request for a continuance to discuss a plea agreement;

	granted. Speedy Trial Time Excluded 11/6/2014-11/10/2014 (XT). Status Conference set for 11/10/2014 at 11:30 AM in Courtroom 9 before Chief Judge Richard W. Roberts. Bond Status of Defendant: Committed/Commitment issued; Court Reporter: William Zaremba; Defense Attorney: PRO SE/A.J. Kramer Standby Counsel; US Attorney: Jeffrey Pearlman; Pretrial Officer: Vaughn Wilson; (hs) (Entered: 11/06/2014)
11/21/2014	CORRECTED***Minute Entry for proceedings held before Chief Judge Richard W. Roberts: Plea Agreement Hearing as to RODNEY CLASS held on 11/21/2014, Guilty Plea entered as to Count 1s., REFERRAL TO PROBATION OFFICE for Presentence investigation. Sentencing Memoranda/Motions due by 1/30/2015. Release Order issued. Sentencing set for 2/9/2015 at 10:00 AM in Courtroom 9 before Chief Judge Richard W. Roberts. Bond Status of Defendant: Personal Recognizance with Electronic Monitoring; Court Reporter: William Zaremba Defense Attorney: PRO Se/A.J. Kramer standby counsel; US Attorney: Jeffrey Pearlman; Pretrial Officer: Vaughn Wilson; (hs) (Entered: 11/24/2014)

11/21/2014	167	WAIVER of Right to Trial by Jury as to RODNEY CLASS, Approved by Chief Judge Richard W. Roberts on 11/21/2014. (hs) (Entered: 11/24/2014)
11/21/2014	169	PLEA AGREEMENT as to RODNEY CLASS (hs) (Entered: 11/24/2014)
01/28/2015	175	ORDER; Denying 176 Defendant's Motion for Discharge & Termination, Signed by Chief Judge Richard W. Roberts on 1/26/15. (lcrwr3) A copy of this order was mailed to defendant's address on record. Modified on 1/29/2015 (hs) (Entered: 01/28/2015)
02/09/2015		Minute Entry; for proceedings held before Chief Judge Richard W. Roberts: Sentencing held on 2/9/2015 as to RODNEY CLASS. Count 1s: Defendant sentenced to Time Served of (24) Days incarceration, followed by a Supervised Release Period of Twelve (12) Months, a Special Assessment of $100.00 and a fine of $250.00 imposed. Bond Status of Defendant: Supervised Release; Court Reporter: William Zaremba Defense Attorney: PRO SE, A J Kramer-standby counsel; US Attorney: Jeffrey Pearlman; Prob Officer: Kathie McGill; (hs) Modified on 2/10/2015 (hs). (Entered: 02/09/2015)

02/13/2015	188	NOTICE OF APPEAL by RODNEY CLASS re Sentence imposed on 2/9/15 and docketed 2/9/15. "Let this be filed as a Notice of Appeal," signed by Chief Judge Richard W. Roberts on 2/11/15. Fee Status: No Fee Paid. (Pro Se Defendant with Stand-By Counsel, Federal Public Defender A.J. Kramer.) Parties have been notified. (mlp) (Entered: 02/13/2015)
03/04/2015	190	JUDGMENT as to RODNEY CLASS. Statement of Reasons Not Included. Signed by Chief Judge Richard W. Roberts on 3/3/15. (mlp) (Entered: 03/09/2015)
11/03/2015	193	TRANSCRIPT OF MOTION HEARING PROCEEDINGS in case as to RODNEY CLASS before Chief Judge Richard W. Roberts held on October 27, 2014; Page Numbers: 1-30. Date of Issuance: November 3, 2015. Court Reporter/Transcriber: William Zaremba; Telephone number: (202) 354-3249. Transcripts may be ordered by submitting the *Transcript Order Form.* For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90

days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, PDF or ASCII) may be purchased from the court reporter.

NOTICE RE REDACTION OF TRANSCRIPTS: The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.

Redaction Request due 11/24/2015. Redacted Transcript Deadline set for 12/4/2015. Release of Transcript Restriction set for 2/1/2016.(wz) (Entered: 11/03/2015)

11/03/2015 194 TRANSCRIPT OF PLEA HEARING PROCEEDINGS in case as to RODNEY CLASS before Chief Judge Richard W. Roberts held on November 21, 2014; Page Numbers: 1-47. Date of Issuance: November 3, 2015. Court Reporter/Transcriber: William Zaremba; Telephone number: (202) 354-3249. Transcripts

may be ordered by submitting the *Transcript Order Form.*

For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, PDF or ASCII) may be purchased from the court reporter.

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Redaction Request due 11/24/2015. Redacted Transcript Deadline set for 12/4/2015. Release of Transcript Restriction set for 2/1/2016.(wz) (Entered: 11/03/2015)

08/29/2016 200 MANDATE of USCA as to RODNEY CLASS re 188 Notice of Appeal; affirming the judgment of

the district court. USCA Case Number 15-3015. (Attachment: # 1 USCA Judgment filed 7/5/16)(mlp) (Entered: 09/01/2016)

General Docket
United States Court of Appeals
for District of Columbia Circuit

Court of Appeals Docket #: 15-3015

United States of America,

Plaintiff-Appellee

v.

Rodney Class,

Defendant-Appellant

David William DeBruin,

Appointed Amicus Curiae for Appellant

02/23/2015	NOTICE OF APPEAL filed [1538829] by Rodney Class seeking review of a decision by the U.S. District Court in 1:13-cr-00253-RWR-1. Assigned USCA Case Number [15-3015]
02/25/2015	MOTION filed [1539936] by Rodney Class to proceed on appeal without counsel. (Response to Motion served by mail due on 03/09/2015) [Service Date: 02/24/2015 by US Mail] Pages: 1-10. [15-3015]
03/10/2015	APPELLANT BRIEF [1543014] filed by Rodney Class [Service Date: 03/10/2015] [15-3015]

05/01/2015	NOTICE FILED [1552002] by Rodney Class for Judgment in Equity. [Service Date: 05/12/2015] [15-3015]
08/27/2015	SUPPLEMENT [1576204] to Appellant/Petitioner brief [1543014-2] filed by Rodney Class [Service Date: 08/25/2015] [15-3015]
09/15/2015	SUPPLEMENT [1576217] to Appellant/Petitioner brief [1543014-2] filed by Rodney Class [Service Date: 09/15/2015] [15-3015]
10/02/2015	PER CURIAM ORDER [1576234] Upon consideration of appellant's motion to proceed on appeal without counsel, the court's letter filed February 27, 2015, appellant's response thereto, appellant's brief, the supplement thereto filed September 15, 2015, and appellant's notices. Ordering appointment of David DeBruin as amicus curiae to present arguments in favor of appellant's position. The clerk is directed a new briefing schedule. Before Judges: Tatel, Brown and Millett. [15-3015]
11/04/2015	APPELLANT BRIEF and APPENDIX [1582319] filed by Rodney Class [Service Date: 11/06/2015] [15-3015]
11/20/2015	AMICUS FOR APPELLANT BRIEF [1584600] filed by Mr. David William DeBruin [Service Date: 11/20/2015]

	Length of Brief: 13,955 words. [15-3015] (DeBruin, David)
11/20/2015	*JOINT* APPENDIX [1584602] filed by Mr. David William DeBruin. [Volumes: 1] [Service Date: 11/20/2015] [15-3015] (DeBruin, David)
11/30/2015	NOTICE [1586291] filed by Rodney Class asking court to allow appointed amicus brief [1584600-2] [Service Date: 11/26/2015] [15-3015]
02/22/2016	APPELLEE BRIEF [1600189] filed by USA [Service Date: 02/22/2016] Length of Brief: 13,306 words. [15-3015] (Jones, Valinda)
02/22/2016	SUPPLEMENTAL APPENDIX [1600190] filed by USA. [Volumes: 1] [Service Date:02/22/2016] [15-3015] (Jones, Valinda)
02/29/2016	APPELLANT REPLY BRIEF [1601544] filed by Rodney Class [Service Date: 02/29/2016] [15-3015]
03/17/2016	AMICUS FOR APPELLANT REPLY BRIEF [1604416] filed by Mr. David William DeBruin [Service Date: 03/17/2016] Length of Brief: 6,998 words. [15-3015] (DeBruin, David)
05/05/2016	ORAL ARGUMENT HELD before Judges Griffith, Srinivasan and Sentelle. [15-3015]

07/05/2016	PER CURIAM JUDGMENT [1622984] filed (without memorandum) that the judgment of the district court be affirmed. (SEE JUDGMENT FOR DETAILS) withholding issuance of the mandate. Before Judges: Griffith, Srinivasan and Sentelle. [15-3015]
08/29/2016	MANDATE ISSUED to Clerk, U.S. District Court. [15-3015]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on May 7, 2012

UNITED STATES OF AMERICA	**CRIMINAL NO.**
v.	**GRAND JURY ORIGINAL**
RODNEY CLASS,	**VIOLATIONS:**
Defendant.	**40 U.S.C. § 5104(e)(1) (Unlawful Possession of a Firearm on Capitol Grounds or Buildings) 22 D.C. Code § 4504(a) (2001 ed.) (Carrying a Pistol (Outside Home or Place of Business))**

INDICTMENT

(Filed Sep. 3, 2013)

The Grand Jury charges that:

COUNT ONE

On or about May 30, 2013, within the District of Columbia, **RODNEY CLASS**, did carry on or have readily accessible, firearms, that is, a Taurus .44 caliber pistol, a Ruger LC9 9mm pistol, and a Henry Arms .44 caliber rifle, on the United States Capitol Grounds or in any of the Capitol Buildings.

(**Unlawful Possession of a Firearm on Capitol Grounds or Buildings**, in violation of Title 40, United States Code, Section 5104(e)(1))

COUNT TWO

On or about May 30, 2013, within the District of Columbia, **RODNEY CLASS**, did carry, openly and concealed on or about his person, in a place other than his dwelling place, place of business or on other land possessed by him, a pistol.

(**Carrying a Pistol (Outside Home or Place of Business)**), in violation of, 22 D.C. Code, Section 4504(a) (2001 ed.))

A TRUE BILL:

FOREPERSON.

Attorney of the United States in
and for the District of Columbia.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on November 1, 2013

UNITED STATES OF AMERICA	**: CRIMINAL NO. 13-253 (RWR)**
v.	**: VIOLATION: 40 U.S.C. § 5104(e)(1) (Unlawful Carrying and Having Readily Accessible a Firearm on Capitol Grounds)**
RODNEY CLASS,	
Defendant.	

INDICTMENT

(Filed Oct. 23, 2014)

The Grand Jury charges that:

COUNT ONE

On or about May 30, 2013, within the District of Columbia, **RODNEY CLASS**, did carry on and have readily accessible, firearms, that is, a Taurus .44 caliber pistol, a Ruger LC9 9mm pistol, and a Henry Arms .44 caliber rifle, on the United States Capitol Grounds.

(**Unlawful Carrying and Having Readily accessible a Firearm on Capitol Grounds**, in violation of Title 40, United States Code, Section 5104(e)(1))

A TRUE BILL:

FOREPERSON.

Attorney of the United States in
and for the District of Columbia.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Criminal Case No. 13-253 (RWR)**
v.	:	
Rodney Class	:	

PROFFER OF EVIDENCE

(Filed Nov. 2, 2014)

If this case were to go to trial, the government's evidence would establish beyond a reasonable doubt:

1. On May 30, 2013, at approximately 11:30AM, Rodney Class parked his Jeep Wrangler in the 200 block of Maryland Avenue, SW, Washington, D.C., which is part of the Capitol Grounds. An agent of the United States Capitol Police observed that the vehicle lacked authorization to park in that area, and upon further inspection noticed that there appeared to be a large blade attached to the inside roller bar of the vehicle, and what appeared to the agent at the time to be a gun holster in the driver's side door.

2. Mr. Class returned to the vehicle at approximately 1:21PM. At that time he admitted to having weapons in the vehicle. The agent obtained a search warrant, which was executed after 6PM. Located inside the vehicle was a large blade attached to the roller bar. What had appeared to be a gun holster in the driver's side door was a knife with a sheath.

3. Located on the passenger seat was an unlocked grey bag containing a 9mm Ruger firearm, loaded with one round in the chamber for a total of 8 rounds. Several loaded magazines were located with 35 additional rounds. A box of 9mm ammunition was also located with 50 rounds, or 93 rounds total.

4. Located in the passenger area was an unlocked large bag containing a .44 Taurus firearm, loaded with one round in the chamber, for a total of 7 rounds. An additional 90 rounds of .44 caliber ammunition was also recovered in the bag.

5. Located between the passenger area and the rear of the vehicle was an unlocked bag containing a .44 Henry firearm, loaded with one round in the chamber, for a total of 11 rounds. An additional 55 rounds of .44 caliber ammunition was recovered in the bag.

6. The Court set a trial date of October 27, 2014. Mr. Class was aware of the trial date but willfully chose not to come to Court.

Limited Nature of Proffer

This proffer of evidence is not intended to constitute a complete statement of all facts known by Mr. Class but is a minimum statement of facts intended to provide the necessary factual predicate for the guilty plea. The limited purpose of this proffer is to demonstrate that there exists a sufficient legal basis for defendant's plea of guilty to the charged offense.

/s/ Jeff Pearlman
Jeff Pearlman
Assistant United
States Attorney

Date: 11-17-14

/s/ A.J. Kramer
A.J. Kramer
Stand By Attorney
for Defendant

/s/ By Agent Rodney Dale
Class: RODNEY CLASS
Rodney Class

Date: 11.16.14

UNITED STATES DISTRICT AND BANKRUPTCY COURTS FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
vs.	)	Criminal Case No.: 13-253
RODNEY CLASS	)	

WAIVER OF TRIAL BY JURY

(Filed Nov. 21, 2014)

With the consent of the United States Attorney and the approval of the Court, the defendant waives his right to trial by jury.

By Agent
Rodney Dale Class:
/s/ RODNEY CLASS
Defendant

/s/ A.J. Kramer
Counsel for Defendant

I consent:

/s/ [Illegible]
A. sistant United
States attorney

Approved:

/s/ Richard W. Roberts Date: 11/21/14
United States
District Judge

[SEAL]

U.S. Department of Justice

Ronald C. Machen Jr.
United States Attorney

District of Columbia

Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530

November 6, 2014

A.J. Kramer
Federal Public Defender for the
District of Columbia
A._J._Kramer@fd.org

Rodney Class
432 North Lincoln Street
High Shoals, NC 28077

Re: United States v. Rodney Class
Criminal Case No. 13-253 (RBR)

Dear Mr. Class:

This letter sets forth the full and complete plea offer to you from the Office of the United States Attorney for the District of Columbia (hereinafter also referred to as "the Government" or "this Office"). This plea offer expires on November 10, 2014. If you accept the terms and conditions of this offer, please execute this document in the space provided below. Upon receipt of the executed document, this letter will become the Plea Agreement (hereinafter referred to as "this Agreement"). The terms of the offer are as follows:

1. Charges and Statutory Penalties

You have been charged with Possession of a Firearm on U.S. Capitol Grounds, in violation of 40 U.S.C. § 5104(e).

You understand that a violation of this statute carries a maximum sentence of 5 years of imprisonment; a fine not to exceed $250,000; a term of supervised release of not more than 3 years; and an obligation to pay any applicable interest or penalties on fines not timely made.

In addition, you agree to pay a special assessment of $100 per felony conviction to the Clerk of the United States District Court for the District of Columbia. You also understand that, pursuant to 18 U.S.C. § 3572 and § 5E1.2 of the United States Sentencing Commission, *Guidelines Manual* (2013) (hereinafter "Sentencing Guidelines," "Guidelines," or "U.S.S.G."), the Court may also impose a fine that is sufficient to pay the federal government the costs of any imprisonment, term of supervised release, and period of probation. Further, you understand that, if you have two or more convictions for a crime of violence or felony drug offense, you may be subject to the substantially higher penalties provided for in the career-offender statutes and provisions of the Sentencing Guidelines.

2. Factual Stipulations

You agree that the attached "Statement of Offense" fairly and accurately describes your actions and

involvement in the offense to which you are pleading guilty. Please sign and return the Statement of Offense as a written proffer of evidence, along with this Agreement.

3. Additional Charges

In consideration of your guilty plea to the above offense, you will not be further prosecuted criminally by this Office for the conduct set forth in the attached Statement of Offense. This includes the prior charge of Carrying a Pistol, in violation of D.C. Code 22-4504(a), and the failure to appear for trial on October 27, 2014, in violation of 18 U.S.C. § 3146(a)(1).

4. Sentencing Guidelines Analysis

You understand that the sentence in this case will be determined by the Court, pursuant to the factors set forth in 18 U.S.C. § 3553(a), including a consideration of the applicable guidelines and policies promulgated by the United States Sentencing Commission, *Guidelines Manual* (hereinafter "Sentencing Guidelines" or "U.S.S.G."). Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), and to assist the Court in determining the appropriate sentence, the parties agree to the following:

A. Estimated Offense Level Under the Guidelines

You agree and will acknowledge at the time of the plea of guilty to the offense stated above that, pursuant to U.S.S.G. § 2K2.5, you are accountable for carrying and having readily accessible on capitol grounds firearms.

The parties agree that the following Sentencing Guidelines sections apply:

U.S.S.G. § 2K2.5	Base Offense Level	6
U.S.S.G. § 3C1.1	Obstructing or Impeding	2
Total Offense Level		8

Acceptance of Responsibility

The Government agrees that a 2-level reduction will be appropriate, pursuant to U.S.S.G. § 3E1.1, provided that you clearly demonstrate acceptance of responsibility, to the satisfaction of the Government, through your allocution, adherence to every provision of this Agreement, and conduct between entry of the plea and imposition of sentence.

Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, and/or imposition of an adjustment for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, regardless of any agreement set forth above, should you move to withdraw your guilty plea after it is entered, or should it be determined by the Government that you have either (a) engaged in conduct, unknown to the

Government at the time of the signing of this Agreement, that constitutes obstruction of justice, or (b) engaged in additional criminal conduct after signing this Agreement.

In accordance with the above, the applicable Guidelines Offense Level will be at least 6.

B. Estimated Criminal History Category

Based upon the information now available to this Office (including the Pre-Plea Criminal History Calculation, you have a prior misdemeanor criminal conviction.

Accordingly, you are estimated to have 1 criminal history point and your Criminal History Category is estimated to be I. You acknowledge that if additional relevant convictions are discovered during the presentence investigation by the United States Probation Office, your criminal history points may increase. Similarly, if the United States Probation Office determines that you have fewer convictions than estimated herein, your criminal history points may decrease.

C. Estimated Applicable Guidelines Range

Based upon the agreed total offense level and the estimated criminal history category set forth above, your estimated Sentencing Guidelines range is 0 months to 6 months (the "Estimated Guidelines Range"). In addition, the parties agree that, pursuant to U.S.S.G. § 5E1.2, should the Court impose a fine, at

Guidelines level 6, the estimated applicable fine range is $500 to $5,000. You reserve the right to ask the Court not to impose any applicable fine.

The parties agree that, solely for the purposes of calculating the applicable range under the Sentencing Guidelines, neither a downward nor upward departure from the Estimated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment to the Estimated Guidelines Range, nor will either party suggest that the Court consider such a departure or adjustment, except as provided in this plea letter. Moreover, you understand and acknowledge that the Estimated Guidelines Range agreed to by the parties is not binding on the Probation Office or the Court. Should the Court determine that a different guidelines range is applicable, you will not be permitted to withdraw your guilty plea on that basis, and the parties will still be bound by this Agreement.

You understand and acknowledge that the terms of this section apply only to conduct that occurred before the execution of this Agreement. Should you commit any conduct after the execution of this Agreement that would form the basis for an increase in your base offense level or justify an upward departure (examples of which include, but are not limited to, obstruction of justice, failure to appear for a court proceeding, criminal conduct while pending sentencing, and false statements to law enforcement agents, the probation officer,

or the Court), the Government is free under this Agreement to seek an increase in the base offense level based on that post-agreement conduct.

5. Agreement as to Sentencing Allocution

The parties further agree that a sentence within the Estimated Guidelines Range would constitute a reasonable sentence in light of all of the factors set forth in 18 U.S.C. § 3553(a). However, you reserve the right to seek a sentence below the Estimated Guidelines Range based upon factors to be considered in imposing a sentence pursuant to 18 U.S.C. § 3553(a), and the Government ~~reserves the right to~~ [will] seek a sentence ~~above~~ [at the lower end] the Estimated Guidelines Range based on § 3553(a) factors. [illegible initials, R.D.C.]

The defendant agrees that as a condition of probation that he may not bring a vehicle to or park on Capitol Grounds. The defendant also agrees that as a condition of probation he must notify the United States Capitol Police prior to visiting the Capitol Grounds.

The government agrees to cap its allocution to the lower end of the sentencing guideline range.

6. Reservation of Allocution

The parties reserve the right to describe fully, both orally and in writing, to the sentencing judge, the nature and seriousness of your misconduct, including any misconduct not described in the charges to which you are pleading guilty. The parties also reserve the right to inform the presentence report writer and the Court of any relevant facts, to dispute any factual inaccuracies in the presentence report, and to contest any matters not provided for in this Agreement. In the event that the Court considers any Sentencing Guidelines adjustments, departures, or calculations different from any agreements contained in this Agreement, or contemplates a sentence outside the Guidelines range based upon the general sentencing factors listed in 18 U.S.C. § 3553(a), the parties reserve the right to answer any related inquiries from the Court. In addition, if in this Agreement the parties have agreed to recommend or refrain from recommending to the Court a particular resolution of any sentencing issue, the parties reserve the right to full allocution in any post-sentence litigation. The parties retain the full right of allocution in connection with any post-sentence motion which may be filed in this matter and/or any proceeding(s) before the Bureau of Prisons. In addition, you acknowledge that the Government is not obligated and does not intend to file any post-sentence downward departure motion in this case pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure.

7. Court Not Bound by this Agreement or the Sentencing Guidelines

You understand that the sentence in this case will be imposed in accordance with 18 U.S.C. § 3553(a), upon consideration of the Sentencing Guidelines. You further understand that the sentence to be imposed is a matter solely within the discretion of the Court. You acknowledge that the Court is not obligated to follow any recommendation of the Government at the time of sentencing. You understand that neither the Government's recommendation nor the Sentencing Guidelines are binding on the Court.

You acknowledge that your entry of a guilty plea to the charged offense authorizes the Court to impose any sentence, up to and including the statutory maximum sentence, which may be greater than the applicable Guidelines range. The Government cannot, and does not, make any promise or representation as to what sentence you will receive. Moreover, it is understood that you will have no right to withdraw your plea of guilty should the Court impose a sentence that is outside the Guidelines range or if the Court does not follow the Government's sentencing recommendation. The parties will be bound by this Agreement, regardless of the sentence imposed by the Court. Any effort by you to withdraw the guilty plea because of the length of the sentence shall constitute a breach of this Agreement.

8. Conditions of Release

The final decision regarding your bond status or detention will be made by the Court at the time of your plea of guilty. If the Court imposes lesser conditions than incarceration, the Government may move to change your conditions of release, including requesting that you be detained pending sentencing, if you engage in further criminal conduct prior to sentencing or if the Government obtains information that it did not possess at the time of your plea of guilty and that is relevant to whether you are likely to flee or pose a danger to any person or the community. You also agree that any violation of your release conditions or any misconduct may result in the Government filing an *ex parte* motion with the Court requesting that a bench warrant be issued for your arrest and that you be detained without bond while pending sentencing.

9. Waivers

A. Statute of Limitations

You agree that, should the conviction following your plea of guilty pursuant to this Agreement be vacated for any reason, any prosecution, based on the conduct set forth in the attached Statement of Offense, that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement (including any counts that the Government has agreed not to prosecute or to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against you, notwithstanding the expiration of the

statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution of conduct set forth in the attached Statement of Offense that is not time-barred on the date that this Agreement is signed.

B. Trial Rights

You understand that by pleading guilty in this case you agree to waive certain rights afforded by the Constitution of the United States and/or by statute or rule. You agree to forego the right to any further discovery or disclosures of information not already provided at the time of the entry of your guilty plea. You also agree to waive, among other rights, the right to plead not guilty, and the right to a jury trial. If there were a jury trial, you would have the right to be represented by counsel, to confront and cross-examine witnesses against you, to compel witnesses to appear for the purpose of testifying and presenting other evidence on your behalf, and to choose whether to testify. If there were a jury trial and you chose not to testify at that trial, you would have the right to have the jury instructed that your failure to testify could not be held against you. You would further have the right to have the jury instructed that you are presumed innocent until proven guilty, and that the burden would be on the United States to prove your guilt beyond a reasonable doubt. If you were found guilty after a trial, you would

have the right to appeal your conviction. You understand that the Fifth Amendment to the Constitution of the United States protects you from the use of self-incriminating statements in a criminal prosecution. By entering a plea of guilty, you knowingly and voluntarily waive or give up your right against self-incrimination.

You acknowledge discussions with A.J. Kramer concerning Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, which ordinarily limit the admissibility of statements made by a defendant in the course of plea discussions or plea proceedings if a guilty plea is later withdrawn. You knowingly and voluntarily waive the rights that arise under these rules in the event you withdraw your guilty plea or withdraw from this Agreement after signing it.

You also agree to waive all constitutional and statutory rights to a speedy sentence and agree that the plea of guilty pursuant to this Agreement will be entered at a time decided upon by the parties with the concurrence of the Court. You understand that the date for sentencing will be set by the Court.

C. Appeal Rights

You understand that federal law, specifically 18 U.S.C. § 3742, affords defendants the right to appeal their sentences in certain circumstances. You agree to waive the right to appeal the sentence in this case, including any term of imprisonment, fine, forfeiture,

award of restitution, term of supervised release, authority of the Court to set conditions of release, and the manner in which the sentence was determined, except to the extent the Court sentences you to above the statutory maximum or guidelines range determined by the Court, in which case you would have the right to appeal the illegal sentence or above-guidelines sentence, but not to raise on appeal other issues regarding the sentencing. In agreeing to this waiver, you are aware that your sentence has yet to be determined by the Court. Realizing the uncertainty in estimating what sentence the Court ultimately will impose, you knowingly and willingly waive your right to appeal the sentence, to the extent noted above, in exchange for the concessions made by the Government in this Agreement.

D. Collateral Attack

You also waive any right to challenge the conviction entered or sentence imposed under this Agreement or otherwise attempt to modify or change the sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255 or Federal Rule of Civil Procedure 60(b), except to the extent such a motion is based on newly discovered evidence or on a claim that you received ineffective assistance of counsel in entering into this Agreement or in connection with sentencing. You reserve the right to file a motion brought under 18 U.S.C. § 3582(c)(2).

E. Privacy Act and FOIA Rights

You also agree to waive all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including and without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.

10. Breach of Agreement

You understand and agree that, if after entering this Agreement, you fails [sic] specifically to perform or to fulfill completely each and every one of your obligations under this Agreement, or engages [sic] in any criminal activity prior to sentencing, you will have breached this Agreement. In the event of such a breach: (a) the Government will be free from its obligations under this Agreement; (b) you will not have the right to withdraw the guilty plea; (c) you will be fully subject to criminal prosecution for any other crimes, including perjury and obstruction of justice; and (d) the Government will be free to use against you, directly and indirectly, in any criminal or civil proceeding, all statements made by you and any of the information or materials provided by you, including such statements, information and materials provided pursuant to this Agreement or during the course of any debriefings conducted in anticipation of, or after entry of, this Agreement, whether or not the debriefings were previously

characterized as "off-the-record" debriefings, and including your statements made during proceedings before the Court pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

You understand and agree that the Government shall be required to prove a breach of this Agreement only by a preponderance of the evidence, except where such breach is based on a violation of federal, state, or local criminal law, which the Government need prove only by probable cause in order to establish a breach of this Agreement.

Nothing in this Agreement shall be construed to permit you to commit perjury, to make false statements or declarations, to obstruct justice, or to protect you from prosecution for any crimes not included within this Agreement or committed by you after the execution of this Agreement. You understand and agree that the Government reserves the right to prosecute you for any such offenses. You further understand that any perjury, false statements or declarations, or obstruction of justice relating to your obligations under this Agreement shall constitute a breach of this Agreement. In the event of such a breach, you will not be allowed to withdraw your guilty plea.

11. Property

The Government and your client hereby agree that the following items seized from you and your vehicle on May 30, 2013, and currently in the custody

and/or control of the Metropolitan Police Department, were properly seized and were involved in or used in violation of federal law by the defendant:

A. Taurus .44 caliber gun with 7 rounds ammunition

B. Ruger 9mm pistol with magazine and 8 rounds ammunition

C. Henry .44 caliber gun with 11 rounds ammunition

D. Knives (14)

E. Switchblade

F. Axes (3)

G. .44 caliber ammo (155)

H. 9mm ammo (50)

Your client agrees that these items are subject to seizure by the United States, and that no defense exists to the seizure of this property by the United States. As such, the defendant hereby relinquishes all claim, title, and interest he has in the above referenced property to the United States and/or the District of Columbia and agrees not to oppose any civil, administrative, or judicial forfeiture of the property. Your client agrees to take any actions requested by this Office or the Metropolitan Police Department to transfer ownership of these items to the United States or the District of Columbia. Your client consents to both the destruction of these items and to their abandonment to the United States or the District of Columbia. Your client agrees that he

will not file a claim to this property and withdraws any claim for the property that he may have filed. Your client knowingly and voluntarily waives any right to timely notice provided for in 18 U.S.C. 983. Your client certifies that he is the sole owner of the property listed above, and that no one else has an ownership interest in this property.

(b) [sic] The defendant agrees to waive all constitutional and statutory challenges in any manner (including, but not limited to, direct appeal) to the seizure and destruction carried out in accordance with this plea agreement on any grounds.

12. Complete Agreement

No agreements, promises, understandings, or representations have been made by the parties or their counsel other than those contained in writing herein, nor will any such agreements, promises, understandings, or representations be made unless committed to writing and signed by you, defense counsel, and an Assistant United States Attorney for the District of Columbia.

You further understand that this Agreement is binding only upon the Criminal and Superior Court Divisions of the United States Attorney's Office for the District of Columbia. This Agreement does not bind the Civil Division of this Office or any other United States Attorney's Office, nor does it bind any other state, local,

or federal prosecutor. It also does not bar or compromise any civil, tax, or administrative claim pending or that may be made against you.

If the foregoing terms and conditions are satisfactory, you may so indicate by signing this Agreement and the Statement of Offense, and returning both to me no later than November 10, 2014.

Sincerely yours,

RONALD C. MACHEN, JR.
United States Attorney

By: /s/ Jeff Pearlman
Jeff Pearlman
Assistant United
States Attorney

DEFENDANT'S ACCEPTANCE

I have read every page of this Agreement and have discussed it with my stand by counsel, A.J. Kramer. I fully understand this Agreement and agree to it without reservation. I do this voluntarily and of my own free will, intending to be legally bound. No threats have been made to me nor am I under the influence of anything that could impede my ability to understand this Agreement fully. I am pleading guilty because I am in fact guilty of the offense(s) identified in this Agreement.

I reaffirm that absolutely no promises, agreements, understandings, or conditions have been made

or entered into in connection with my decision to plead guilty except those set forth in this Agreement. I am satisfied with the legal services provided by my attorney in connection with this Agreement and matters related to it.

Date: 11.16.14

By Agent Rodney Dale Class:
RODNEY CLASS
Rodney Class
Defendant

ATTORNEY'S ACKNOWLEDGMENT

I have read every page of this Agreement, reviewed this Agreement with Rodney Class, for whom I am stand by counsel, and fully discussed the provisions of this Agreement with him. These pages accurately and completely set forth the entire Agreement. I concur in Mr. Class' desire to plead guilty as set forth in this Agreement.

Date: 11.16.14

A.J. Kramer
A.J. Kramer
Stand by Counsel for
Rodney Class

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, vs. RODNEY CLASS, Defendant.	CR No. 13-253-RWR-1 Washington, D.C. November 21, 2014 2:15 p.m.

TRANSCRIPT OF PLEA HEARING
BEFORE THE HONORABLE RICHARD W. ROBERTS
UNITED STATES DISTRICT CHIEF JUDGE

APPEARANCES:

For the Government:

Jeffrey Pearlman
U.S. ATTORNEY'S OFFICE
FOR THE DISTRICT
OF COLUMBIA
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For the Defendant:

Rodney Class
P.O. Box 435
High Schoals [sic], NC 28077
PRO SE

Standby Counsel
for the Defendant:

A.J. Kramer
FEDERAL PUBLIC
DEFENDER
FOR THE DISTRICT
OF COLUMBIA
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(202) 208-7500
A._J._kramer@fd.org

* * *

[3] PROCEEDINGS

THE COURT: Good afternoon.

(Defendant entered.)

DEPUTY CLERK: Your Honor, this afternoon this is the matter of United States versus Rodney Class. This is Criminal Record 13-253.

Present for the Government –

MR. KRAMER: Your Honor, I'm sorry, we're having a problem.

THE COURT: Mr. Class, are you able to hear me?

(Pause)

THE COURT: This is off the record.

(Pause)

DEPUTY CLERK: Your Honor, this afternoon is the matter of the United States versus Rodney Class, Criminal Record 13-253.

Present for the Government is assistant Jeffrey Pearlman.

And Mr. Class is representing as pro se.

Also standby counsel, A.J. Kramer.

All parties are present, Your Honor.

THE COURT: All right. Good afternoon.

MR. KRAMER: Good afternoon.

THE COURT: Mr. Class, can you hear me?

THE DEFENDANT: (Indicates thumbs up.)

[4] THE COURT: Thank you. Your finger is up.

If at any time you cannot hear me or anyone else speaking, I'd ask you to continue to let us know in some way, give us a signal. Will you do that?

THE DEFENDANT: Yeah.

THE COURT: All right.

I understand, Mr. Class, that you are proposing to enter a plea of guilty; is that correct?

THE DEFENDANT: Yes.

THE COURT: Let me invite you forward to the podium with your standby counsel.

And before we proceed any further, I'll ask Mr. Smith to administer the oath to you.

DEPUTY CLERK: Mr. Class, would you raise your right hand to be sworn.

(Defendant is placed under oath.)

THE DEFENDANT: Yes.

DEPUTY CLERK: Thank you.

THE COURT: Good afternoon, Mr. Class.

THE DEFENDANT: Hello.

THE COURT: You're now under oath. If you do not answer any of my questions truthfully, you could be prosecuted for perjury or for making a false statement. Do you understand that?

THE DEFENDANT: Yes.

[5] THE COURT: The purpose of this hearing is for you to make a decision whether you want to go to trial on the charge against you or whether you want to enter a plea of guilty to that charge.

In order to make such an important decision, it's vital that you understand everything that's going on and everything that I will be explaining to you.

So if you do not understand something, please let me know that and I will try to explain it to you in a clearer fashion, or I will let you stand and talk with your standby counsel at any time about what we are discussing.

So will you promise to let me know if there's anything that you do not understand?

THE DEFENDANT: Yep.

THE COURT: How old are you now, sir?

THE DEFENDANT: 61. I just turned 61 yesterday.

THE COURT: Belated happy birthday.

Can you read and write?

THE DEFENDANT: Yes.

THE COURT: How far did you go in school?

THE DEFENDANT: 12th grade.

THE COURT: And where were you born?

THE DEFENDANT: Dover, Ohio.

THE COURT: Have you taken any alcohol or drugs in the last 48 hours?

[6] THE DEFENDANT: No. But just medication I take for heart.

THE COURT: And have you taken any of that medicine that might affect your ability to understand what you're doing by proposing to plead guilty?

THE DEFENDANT: No.

THE COURT: Have you ever received any treatment for any type of mental illness or emotional disturbance?

THE DEFENDANT: No.

THE COURT: Have you ever received any treatment for addiction to narcotic drugs of any kind?

THE DEFENDANT: No, I don't do drugs or illegal narcotics.

THE COURT: Have you received a copy of the superseding indictment pending against you that contains the written charge in this case?

THE DEFENDANT: Yes.

THE COURT: Have you read the indictment?

THE DEFENDANT: Yes.

THE COURT: Do you understand the charge?

THE DEFENDANT: Yeah.

THE COURT: Have you fully discussed the charge and this case in general with your standby lawyer?

THE DEFENDANT: Off and on, yeah.

THE COURT: Are you satisfied with the services of [7] your standby lawyer so far?

THE DEFENDANT: Yeah.

THE COURT: Have you had enough time to talk with your standby lawyer about this case?

THE DEFENDANT: Yes.

THE COURT: Have you had enough time to talk with your standby lawyer about the government's plea offer and whether or not you should accept it?

THE DEFENDANT: Yeah. We talked about it up there at the jail.

THE COURT: The pending superseding indictment charges that on or about May 30th of last year here in D.C., you did have readily accessible firearms on the Capitol – United States Capitol grounds.

If you were to be convicted in a trial with that charge and presented to the jury, the government would carry the burden of proving beyond a reasonable doubt each and every essential element of that charge, which would include, first, that you carried or had readily accessible a firearm, that you did so knowingly, and that you carried or had readily accessible a firearm while you were on the United States Capitol grounds.

So, Mr. Class, I'm going to ask the prosecutor to tell you and to tell me what happened in this case, and I want you to listen very carefully to everything that he [8] says, because when he's finished, I'm going to ask you if everything that he has said is true and accurate.

If there's anything that he says that's not true or accurate, I'll want you to tell me that after he's finished. So will you promise to listen carefully to everything that he says –

THE DEFENDANT: Yeah.

THE COURT: – and to let me know if there's anything that he says that's not accurate?

THE DEFENDANT: Yep.

THE COURT: All right. Thank you.

MR. KRAMER: May I just talk to Mr. Pearlman for one second?

THE COURT: Yes.

(Counsel conferred off the record.)

MR. KRAMER: Thank you.

THE COURT: All right. Mr. Pearlman, what would the government's evidence show if this case went to trial?

MR. PEARLMAN: Your Honor, on May 30th, 2013, at approximately 11:30 a.m., Rodney Class – I assume Mr. Class can hear me – parked his Jeep Wrangler in the 200 block of Maryland Avenue, Southwest, Washington, D.C., which is part of the Capitol grounds.

An agent of the United States Capitol Police observed that the vehicle lacked authorization to park in [9] that area; and upon further inspection, noticed that there appeared to be a large blade attached to the inside roller bar of the vehicle, and what appeared to the agent at the time to be a gun holster in the driver's side door.

Mr. Class returned to the vehicle at approximately 1:21 p.m. At that time, he admitted to having weapons in the vehicle. The agent obtained a search warrant which was executed after 6:00 p.m.

Located inside the vehicle was a large blade attached to the roller bar, what had appeared to be a gun holster in the driver's side door was a knife with a sheath.

Located on the passenger seat was an unlocked gray bag containing a 9-millimeter Luger firearm loaded with one round in the chamber, for a total of eight rounds. Several loaded magazines were located with 35 additional rounds. A box of 9-millimeter ammunition was also located with 50 rounds or 93 total.

Located in the passenger area was an unlocked large bag containing a .44 Taurus firearm loaded with one round in the chamber, for a total of seven rounds; an additional 90 rounds of .44 caliber ammunition was also recovered in the bag.

Located between the passenger area and the rear of the vehicle was an unlocked bag containing a .44-caliber Henry firearm loaded with one round in the chamber, for a [10] total of 11 rounds. An additional 55 rounds of .44-caliber ammunition was recovered in the bag.

The Court set a trial date of October 27th, 2014. Mr. Class was aware of the trial date but willfully chose not to come to court.

THE COURT: All right. Thank you.

Mr. Class, would you come back up to the podium with your standby counsel.

Mr. Class, is what the prosecutor has just said a true and accurate description of what happened in this case?

THE DEFENDANT: Pretty much.

THE COURT: Is it true that on May 30th, 2013, you parked your Jeep Wrangler in the 200 block of Maryland Avenue, Southwest, on Capitol grounds?

THE DEFENDANT: I don't know what street it was in. I parked in behind the arboretum.

THE COURT: Was it on Maryland Avenue, Southwest? That arboretum?

THE DEFENDANT: Well, I assume so. I just parked in the parking lot behind the arboretum right there in front of the White House. I didn't know what street it was.

THE COURT: I want to make sure that we know which arboretum you're talking about. There's an arboretum that's way out Route 50 in Northeast Washington, D.C., that's huge, with lots of plants and animals and joggers and all kinds of [11] stuff.

There's another arboretum that's covered that's right at the base of the United States Capitol building.

Are you talking about the arboretum that's at the base of the Capitol building?

THE DEFENDANT: Yes.

MR. KRAMER: Yes, Your Honor. I think it's actually – there is an arboretum out on New York Avenue.

THE COURT: New York Avenue, right.

MR. KRAMER: But I think it's actually called the botanical gardens, the one in D.C.

THE COURT: We are not –

MR. KRAMER: The building.

The building –

THE COURT: The building at the base of the Capitol?

MR. KRAMER: Yes, is actually called the botanical gardens.

THE COURT: Did you hear what Mr. Kramer just described to me?

THE DEFENDANT: Yeah.

THE COURT: He said it's called the botanical gardens.

THE DEFENDANT: Yeah.

THE COURT: But you were calling it the arboretum.

[12] THE DEFENDANT: Yeah.

THE COURT: But you mean the same building that Mr. Kramer was talking about?

THE DEFENDANT: Yes.

THE COURT: It's enclosed, right?

THE DEFENDANT: Yes.

THE COURT: All right. And it's at the base of the Capitol building.

THE DEFENDANT: Yes.

THE COURT: All right. So I guess I'm asking you is it true that on May 30th, 2013, you parked your Jeep Wrangler just outside that arboretum, what you're calling the arboretum, but what we now know to be the botanical gardens?

THE DEFENDANT: Yes.

THE COURT: All right. And is it true that you knew you had in your vehicle a loaded Luger, a loaded Taurus, and a loaded Henry firearm?

THE DEFENDANT: Yes. I had a carry permit.

THE COURT: You had a what?

THE DEFENDANT: I had a carry concealed permit.

THE COURT: But you knew you had those weapons inside your Jeep Wrangler?

THE DEFENDANT: Yes.

THE COURT: Now, Mr. Class, I want to explain to [13] you certain rights that you have in this matter, and I want to find out whether you understand those rights.

So listen carefully to what I tell you and to the questions that I ask you and be sure and let me know if there's anything that you don't understand. Will you promise to do that?

THE DEFENDANT: Yep.

THE COURT: And if you need to talk to your standby counsel at any time, I'll let you do that. So let me know if you want to do that.

THE DEFENDANT: Okay.

THE COURT: And, again, if at any time I'm not speaking loudly or clearly enough, please let me know, because I'll try to accommodate you, okay?

THE DEFENDANT: Okay.

THE COURT: All right.

You have a right to be represented by a lawyer at every stage in the case, and, if necessary, to have the Court appoint a lawyer for you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You have a right to maintain your previously entered plea of not guilty to the charge against you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You would have a right to file [14] motions, making legal challenge as to the government's case against you. For example, you could seek to have the charge dismissed or file a motion to have evidence against you suppressed or thrown out. Do you understand those things?

THE DEFENDANT: Yeah. We went through this once before, yes.

THE COURT: All right. And you have the right to have a jury trial in this case, and that means that 12 citizens of the District of Columbia would sit in a courtroom and determine whether you are guilty or not guilty based upon the evidence presented in a courtroom.

Do you understand your right to a jury trial?

THE DEFENDANT: Yes.

THE COURT: If you choose to go to trial, you have a right to be represented by a lawyer at that trial. Do you understand that?

THE DEFENDANT: Say that again.

THE COURT: Sure. If you choose to go to trial, you would have a right to be represented by a lawyer if you wanted to at that trial.

THE DEFENDANT: Oh, okay. Okay.

THE COURT: Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: At a trial, you would have the right to confront or have your lawyer confront and cross-examine [15] any witnesses who testified against you. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: You would have the right to present your own witnesses at a trial if you wanted one, and you would have the right to subpoena them to require them to testify in your defense. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: At a trial, you would have the right to testify and to present evidence on your behalf if you wanted to, but you would not be required to testify or to present any evidence if you did not want to. That's because you cannot be forced to incriminate yourself. That means you cannot be forced to present evidence of your own guilt. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you chose not to testify or to put on any evidence, those choices could not be used against you. Do you understand that?

THE DEFENDANT: Yep.

THE COURT: At a trial, you would be presumed by the law to be innocent, just as you are now. That's because it is the government's burden to prove

your guilt, and until it does that, you cannot be convicted at any trial. Do you understand that?

[16] THE DEFENDANT: Yeah.

THE COURT: If you went to trial and you were convicted, you would have a right to appeal your conviction to the Court of Appeals and to have a lawyer help you prepare your appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you know what I mean by your right to appeal?

THE DEFENDANT: Yeah. Take it to the next court up.

THE COURT: All right.

Now, by pleading guilty, you would be generally giving up your rights to appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, there are exceptions to that. You can appeal a conviction after a guilty plea if you believe that your guilty plea was somehow unlawful or involuntary or if there is some other fundamental defect in these guilty-plea proceedings.

You may also have a right to appeal your sentence if you think the sentence is illegal. Do you understand those things?

THE DEFENDANT: Yeah. Pretty much.

THE COURT: Now, if you plead guilty in this case and I accept your guilty plea, you'll give up all of the [17] rights I just explained to you, aside from the exceptions that I mentioned, because there will not be any trial, and there will probably be no appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, I mentioned that you may also have a right to appeal your sentence if you think the sentence is illegal.

You may also have a right to appeal that sentence if it exceeds the Sentencing Guideline Range.

You could also challenge your conviction or sentence based on newly discovered evidence or a claim of ineffective assistance of counsel. Do you understand those things?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you want to give up your right to a trial?

THE DEFENDANT: I've already signed that document.

THE COURT: I guess the document you're talking about is the Waiver of Trial by Jury?

THE DEFENDANT: Well, the – yeah. The plea bargain. I already signed it.

MR. KRAMER: I think he's referring to the plea agreement, Your Honor.

THE COURT: All right. I have been given a plea agreement that I will hold up in front of you in a [18] moment. It is marked as Exhibit No. 3. I'm holding that up in front of you now. Is this what you're referring to?

THE DEFENDANT: Looks like it.

THE COURT: Well, let me turn to the back page, it's page 10, and hold that up in front of you. Do you see that page?

THE DEFENDANT: Yeah.

THE COURT: My finger is pointing to a signature above the line marked "Rodney Class, Defendant." Do you see that?

THE DEFENDANT: Correct.

THE COURT: Is that your signature?

THE DEFENDANT: Correct.

THE COURT: You signed your name to this plea agreement?

THE DEFENDANT: Yeah. I put my name on it, yeah.

THE COURT: And did you do that after agreeing that you would plead guilty and agree to the terms of this agreement?

THE DEFENDANT: We did it over at the jailhouse.

THE COURT: And you signed this agreeing to what the terms are in this paper?

THE DEFENDANT: Yeah.

THE COURT: All right. What I wanted to make sure that you could tell me, though, part of this agreement [19] suggests that you are willing to give up your right to a jury trial. Are you willing to give up your right to a jury trial?

THE DEFENDANT: Yes.

THE COURT: Are you willing to give up all of the rights I've explained that you would have if your case went to trial?

THE DEFENDANT: Yes.

THE COURT: Do you want to give up most of your rights to an appeal as well?

THE DEFENDANT: Other than what you mentioned, yes.

THE COURT: Aside from those exceptions.

I'm now going to hold up what I've talked to you about before, the Waiver of Trial by Jury. It's marked as Exhibit No. 1. Do you see this document I'm holding up?

THE DEFENDANT: Yes.

THE COURT: My finger is pointing to a line marked – signature above the line marked, "Defendant." Do you see that signature?

THE DEFENDANT: Yes. I put my name on it.

THE COURT: That's your signature?

THE DEFENDANT: Yes.

THE COURT: All right. And did you sign this voluntarily and of your own free will?

[20] THE DEFENDANT: Yes.

THE COURT: Did you sign this intending to give up your right to a jury trial?

THE DEFENDANT: Yes.

THE COURT: Did you mean to give up that right by signing this?

THE DEFENDANT: Yes.

THE COURT: Do counsel know of any reason why Mr. Class should not waive his right to a jury trial?

MR. KRAMER: No, Your Honor.

MR. PEARLMAN: No, Your Honor.

THE COURT: All right. I find that this waiver of jury trial marked as Exhibit 1 is made knowingly and voluntarily, and I'll accept that waiver.

Now, I will go back to the document you told me about earlier, Mr. Class, the plea agreement.

Do you have your own copy of the plea agreement?

THE DEFENDANT: (Indicates.)

THE COURT: Are you holding up your copy of the plea agreement?

THE DEFENDANT: What he gave me, yeah.

THE COURT: And have you carefully read it?

THE DEFENDANT: I've read over it several different times, yeah.

THE COURT: And do you understand its terms?

[21] THE DEFENDANT: Pretty much.

THE COURT: Have you discussed this plea agreement with your standby lawyer?

THE DEFENDANT: The what?

THE COURT: Have you discussed the plea agreement with your standby lawyer, Mr. Kramer?

THE DEFENDANT: Just that one day.

THE COURT: All right. And does this plea agreement represent the entire understanding and agreement that you have with the government?

THE DEFENDANT: Yeah.

THE COURT: Has anybody given you any other or different assurance of any kind to try to get you to plead guilty in this case?

THE DEFENDANT: No.

THE COURT: Do you have any confusion or question about the plea agreement at this point?

THE DEFENDANT: No, not really.

THE COURT: All right. As I understand it, you are agreeing to plead guilty to the offense of unlawful carrying and having readily accessible a firearm on Capitol grounds. If I accept your guilty plea in this case, you could receive a maximum sentence of up to five years in prison. You would be subject to a term of supervised release of not more than three years.

[22] Supervised release means that if you're sent to prison, then upon your release, you would be on supervision under conditions and rules with which you'd have to comply. If you violate any of those conditions, you could be sent back to prison for an additional period of time.

If you plead guilty to this charge, it could also subject you to a maximum fine of $250,000, and you'd be required to pay a Special Assessment of $100. And if appropriate, you may be ordered to forfeit certain property to the government.

Mr. Class, do you understand the maximum punishment you could face if you decide that you want to plead guilty?

THE DEFENDANT: Yes.

THE COURT: Now, there are numerous factors, including complicated guidelines, that federal judges have to consider in determining an appropriate sentence in a criminal case.

A Sentencing Guidelines manual recommends specific sentencing ranges for specific offenses, and your criminal record, if you have one, and the nature of this offense are some of the factors that may influence what your recommended Sentencing Guideline Range may be.

A probation officer will conduct a presentence investigation and submit a written report on those factors [23] and other factors to me and to the attorneys, and your standby attorney will go over it with you. Both sides' attorneys will have chance to suggest changes to the report or object to portions of the report.

At the time of sentencing – can you hear me?

THE DEFENDANT: Well, you cut out for a minute, but go ahead.

THE COURT: All right.

At the time of sentencing, I will hear from both sides' attorneys, and I will determine what your recommended Sentencing Guideline Range is. Once I do

that, I have to consider a sentence within that recommended range, possible departures from that range, and the other sentencing factors. But I can never sentence you to more than the maximum punishment that I explained to you a little while earlier. Do you understand those things?

THE DEFENDANT: Yeah.

THE COURT: Have you and your standby counsel talked about the Sentencing Guidelines and how they might apply to your case?

THE DEFENDANT: No.

(Counsel conferred with defendant off the record.)

THE DEFENDANT: Oh. All right.

THE COURT: If you have your own copy of the plea agreement that you read and signed, I would invite you [24] to turn to page 2 of that agreement.

THE DEFENDANT: Okay. We got it.

THE COURT: Do you see near the bottom of that page what's called in, numbered paragraph 4, Sentencing Guidelines analysis?

THE DEFENDANT: Okay.

THE COURT: And then subparagraph A talks about estimated offense level under the Guidelines. Do you see that?

THE DEFENDANT: Yes.

THE COURT: Underneath that, you see abbreviation for U.S. Sentencing Guidelines and it cites certain sections: 2K2.5 and 3C1.1. Do you see that?

THE DEFENDANT: Yes.

THE COURT: Do you see that there's a total offense level calculated, estimated to be 8?

THE DEFENDANT: Okay. Yeah.

THE COURT: If you turn the page and look at page 3 of the plea agreement that you've read and have in front of you and go down to the paragraph –

MR. KRAMER: Your Honor, I don't –

THE DEFENDANT: You cut back out again. Start at – when you went to that page 3, start over again.

THE COURT: If you turn to page 3 and you go down to the subparagraph that's labeled "C, Estimated applicable [25] Guidelines Range." Do you see that?

THE DEFENDANT: Yep.

THE COURT: All right.

And then if you look at the first sentence on the second line, you see an estimated Sentencing Guideline Range that is spelled out in a number of months. Do you see that?

THE DEFENDANT: Yes.

THE COURT: Have you and your attorney, standby attorney, talked about the Sentencing Guideline Range and the estimated range?

THE DEFENDANT: Sort of hit and miss here. We talked, but we didn't really get into a whole lot.

THE COURT: Well, do you have an understanding about what the estimated Sentencing Guideline Range is?

THE DEFENDANT: It's supposed to be, what, zero to six months?

THE COURT: All right. That's what I wanted to know.

Now, I wanted you to know, though, that I will not be able to determine the ultimate recommended Sentencing Guideline Range for your case until after the presentence report has been completed and after you and your standby counsel and government counsel have had a chance to object to any facts or conclusions that have been drawn by the probation officer. Do you understand that?

[26] THE DEFENDANT: Yeah.

THE COURT: Now, indeed, the report may show, for example, that your criminal record is greater than it appears now or that other enhancements might apply that don't appear now and that your recommended Guideline Range could expose you to up to the maximum term under the statute of five years, not just

the six months that you heard about in the plea agreement. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And the sentence imposed may be higher than any estimate that your attorney or the government may have made, or that this agreement talks about. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Indeed, it could be as high as five years under the statute. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Now, after I've decided what Guideline Range is recommended for your case, I still have the authority to impose a sentence that is more severe or less severe than the sentence called for by the Sentencing Guidelines. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: The government may have the right, just like you do, to appeal any illegal or improper sentence [27] that I impose. Do you understand that?

THE DEFENDANT: You said the government can?

THE COURT: If I impose an illegal sentence, the government may have a right to appeal that, just like you would have the right to appeal a sentence

that's illegal. That's what I was trying to get you to hear. Do you understand that?

THE DEFENDANT: Okay.

THE COURT: Do you understand that?

THE DEFENDANT: Well, yeah.

THE COURT: Okay.

Now, parole has been abolished. And if you are sentenced to prison, you will serve the sentence I impose, and you will not be released early on parole as used to be the case, but you may be subject to a possible reduction of any prison term for good time of up to 54 days a year. Do you understand that?

THE DEFENDANT: Okay.

THE COURT: Now, the offense to which you are proposing to plead guilty is a felony offense. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you plead guilty and I accept your plea and find you guilty of a felony, then such a finding may deprive you of valuable civil rights, such as the right [28] to vote, the right to hold public office, the right to serve on a jury, the right to possess any kind of firearm, and the right to be free from collection of DNA samples from you.

THE DEFENDANT: What's that last word?

THE COURT: DNA is the abbreviation for Deoxyribonucleic acid. It means sort of body samples. Have you heard of DNA before?

THE DEFENDANT: Yeah. They could take DNA at any time. I didn't understand.

THE COURT: Ordinarily, if you're not convicted of a felony and the government wants to take your DNA –

THE DEFENDANT: Yeah.

THE COURT: – you can tell them to go pound sand.

THE DEFENDANT: Okay.

THE COURT: When you're convicted of a felony, the government can then come to you and insist, "We want to take your DNA and keep it in our records."

THE DEFENDANT: Oh, all right.

THE COURT: That's what I was trying to say. Do you understand that?

THE DEFENDANT: Oh, yeah.

THE COURT: Now, under this plea agreement, you are giving up your right to appeal your conviction and challenge the sentence I impose, unless the sentence exceeds the statutory maximum of the Guidelines Range or you claim [29] newly discovered evidence or ineffective assistance of counsel. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If I do not accept any sentencing recommendation that may have been suggested in the plea agreement or ends up being made by the lawyers at sentencing, you would still be bound by your guilty plea, and you will not have a right to withdraw that guilty plea. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Has anyone at all promised to you or suggested to you that I will give you a lighter sentence just because you're pleading guilty?

THE DEFENDANT: No.

THE COURT: Has anyone made any promises to you as to what sentence I will impose in this case if I accept your proposed guilty plea?

THE DEFENDANT: That – what you would impose? No.

THE COURT: At this time, I do not know what sentence I will impose in your case, because I've not yet heard from the probation office or from the lawyers so far. Do you understand that?

THE DEFENDANT: Yep.

THE COURT: Has anyone made any promises to you in [30] connection with your proposed guilty plea other than those contained in this plea agreement?

THE DEFENDANT: No.

THE COURT: Is there anything that you do not understand about this proceeding or about your proposed plea in this case?

THE DEFENDANT: No, not really. I pretty much got my – got an understanding what we've been doing for the last 18 months.

THE COURT: Is there anything you want to ask me or ask your standby lawyer before you make a decision about whether you want to plead guilty or whether you want to go to trial?

THE DEFENDANT: No. Like I said, I pretty much put my name on the document. I figured that was pretty much the end of it.

THE COURT: Well, I always have to make sure you understand what's going on before it ends, and that's why I was going through all of this.

THE DEFENDANT: Okay.

THE COURT: So are you ready now to make a decision about whether you want to enter a plea of guilty or whether you want to go to trial?

THE DEFENDANT: Oh, just plead guilty.

THE COURT: Are you pleading guilty voluntarily [31] and of your own free will?

THE DEFENDANT: Yeah.

THE COURT: Has anyone forced you or threatened you or coerced you in any way into pleading guilty?

THE DEFENDANT: No.

THE COURT: Are you pleading guilty because you are guilty and for no other reason?

THE DEFENDANT: All right. Yeah.

THE COURT: Is that a yes?

THE DEFENDANT: Yeah.

THE COURT: All right.

I'm satisfied that Mr. Class is fully competent and capable of making a decision today, that he understands the nature and consequences of what he's doing, that he is acting voluntarily and of his own free will, and there is an adequate factual basis for his plea. I, therefore, accept your plea of guilty.

Mr. Class, if you would like to have a seat now, you may have a seat.

I will now turn to the question I understand the lawyers want to discuss with me about any conditions of release.

If you want to stay there at the podium, you can. It might be easier if you have a seat and let me hear what the lawyers have to argue. Would you like to have a seat?

[32] THE DEFENDANT: Yeah.

THE COURT: You may have a seat.

And if at any time you can't hear the lawyers or me, please let us know, okay?

THE DEFENDANT: Yeah.

MR. KRAMER: Thank you, Your Honor.

As I mentioned to Your Honor yesterday, in light of the – now that the plea is entered and in light of what the parties believe, obviously, I recognize we could be wrong about the Guideline Range or what Your Honor determines is the Guideline Range, but we – obviously, we've been in this case for a long time, and the parties think that the range is zero to six months. And the government has agreed to recommend the lower part, which is obviously zero additional time, whether that be a probationary sentence from here on out or time served in a supervised release period from here on out.

Of course, that's – none of that is binding upon Your Honor. But in light of the government's recommendation that Mr. Class serve no further time, I would ask Your Honor to release him pending sentencing.

I talked with him at length about it, and he's assured me, and he's willing to assure Your Honor, that he will appear for the sentencing.

As I mentioned last time also, there's a friend of [33] his that has been in court every time and actually was here for the trial as well, who would be willing –

obviously, we didn't know what Your Honor's decision on this would be and we don't mean to take anything for granted. So if Your Honor was willing to release him, he would take Mr. Class to his house tonight, which is in Virginia.

And then tomorrow, he would arrange – he's already made arrangements, if Your Honor agrees to his release, to meet Mr. Class's wife down in Virginia where she would take Mr. Class and immediately take him home tomorrow.

THE COURT: Home to?

MR. KRAMER: High Shoals, North Carolina, where he was residing the entire time of the – however long the case – while the case was pending, until the time he did not appear for the trial.

And he is in the audience, Your Honor, and as I said, willing to take him to his house tonight and then ensure the transfer to Mr. Class's wife tomorrow, who would then immediately take him home.

And, Your Honor, obviously, a travel restriction to that district, it's just outside – well, I say "just outside," I think it's a half hour, 40 minutes outside of Charlotte. He was reporting to a Pretrial Services officer there in Charlotte. So that would be the district where – if Your Honor – to restrict his travel to that district and [34] report to that office in Charlotte.

THE COURT: Mr. Kramer, let me ask you this. Other than the comment I made yesterday, which is that you've sort of promised me one-way assurance

but not a round-trip assurance, what other alternatives have you considered?

And I ask this for one reason in particular.

My understanding is that the supervision that was provided earlier while Mr. Class was under the high-intensity supervision program was done as a courtesy by that district in North Carolina. My understanding is that that district is unwilling to continue to extend that courtesy.

MR. KRAMER: I had no idea – this is the first I've heard of that, obviously so . . .

THE COURT: I will have to confirm whether that's still the case. But I understood that there was some point before now where that district had decided it had run out about all the courtesy it was prepared and willing to extend. And so I guess I'm just asking you what, if any, other alternatives have you discussed?

MR. KRAMER: I haven't. And, again, I didn't even know the part that earlier they had expressed. It was certainly never in any of their Pretrial Services reports that were received.

THE COURT: Uh-huh.

[35] MR. KRAMER: So he has a wife who, I think, we actually scheduled the trial a little later because she had had some surgery. So she has some serious medical problems. And so I hadn't – if Your Honor was to release him, I mean, his intent was to go back

and – obviously, he has his own medical problems, but she has more serious ones. And the intent was for him to go home and take care of her until the sentencing. And then, hopefully, at the sentencing, given the government's recommendation, he would be able to continue to do that. So I hadn't considered any, because I had no idea there was a problem.

I mean, the only other thing I can suggest is that he – that Your Honor allow him to go home, and he would be perfectly willing to phone in, frankly, every day to the Pretrial Services office here in D.C. That would be an alternative that I could see, if they weren't willing to have him even – I'm unclear if it's just the fact of having him phone in there or if it's – it was the ankle bracelet that they were – because that –

THE COURT: Well –

MR. KRAMER: – of the supervision. I don't know which part they weren't willing to continue or the entire part.

THE COURT: I'm not sure that I parsed out or understood that there was a parsing out.

[36] The high-intensity supervision program generally requires a number of things: Wearing the ankle bracelet, making home visits to assure that there were no weapons, contact of some kind, potentially calls. I think it may have involved some or all of those issues that posed problems for that district's supervision.

MR. KRAMER: I know that it – the Classes have very little money, and I know that at some point

Your Honor lowered the amount of money they were responsible for on the – from $100 to $50 a month, and even that was stretching them. And I don't know if that entered into also the [sic] North Carolina not wanting to supervise him anymore since they weren't paying the full expense of that supervision too. So if that was the case, I mean, it's just that they don't have the money, frankly.

THE COURT: I don't know anything about that, but I probably want to hear from you all about other alternatives, given what I understand to be a difficulty with that district continuing to agree to supervision as a courtesy.

Part of the other – your argument is that we face a circumstance where the Guidelines are zero to six. If that's true, government is presumably going to come in and ask for zero, if it ends up being zero to six; and it would call into the wisdom of Mr. Class remaining in D.C. in [37] custody, all valid arguments.

One principal concern, obviously, is that I don't know yet about the round-trip promise. I'd want to see if there's a circumstance that would build in some incentive for that round trip. You mentioned a gentleman who was kind enough to come and be present and to transport Mr. Class at least back to Virginia for one night.

That gave me the thought of having some kind of an unsecured promissory bond that would subject the gentleman to some kind of monetary forfeiture should Mr. Class not return. Alternatively, a release into the –

or, in addition, alternatively, released into the custody of the gentleman's – into the custody of the gentleman to stay up here until we have to return.

So I'm just generating thoughts about what potential alternatives there might be and that might be worthy of pursuit.

MR. KRAMER: Could I have a moment to talk to him, Your Honor?

THE COURT: Absolutely.

MR. KRAMER: Thank you.

THE COURT: Both to Mr. Class and the gentleman who was kind enough to show up.

(Counsel conferred with defendant off the record.)

MR. KRAMER: Your Honor, I talked to – his name [38] is Robert Hoff, H-o-f-f. He is willing to sign a surety bond. He did – I mentioned the figure of $1,000 as a possibility. He said he would be perfectly willing to sign a surety bond for that amount of money for Mr. – to ensure Mr. Class's appearance.

And I know that Mr. Class is prepared – and I understand Your Honor's trepidation, but I know that he's willing to give Your Honor his word. I asked him specifically about it, that he will show up for the sentencing.

THE COURT: All right. Thank you.

Mr. Pearlman.

MR. PEARLMAN: I guess Your Honor had discussions with the Pretrial officer. Is there any more information Your Honor can provide about what the view of the Pretrial office down in North Carolina actually is?

THE COURT: There is, and I'll expect to call them up, but I'd be happy to hear your view.

MR. PEARLMAN: What?

THE COURT: Yes, there is. I'll be calling him up, but I'm asking you for your views about conditions of release, if any.

MR. PEARLMAN: I'm asking for the same conditions that – I don't oppose him being released from the D.C. jail and being returned in a quick manner to his home in North [39] Carolina.

I would ask for the same conditions that he had when he was awaiting trial in October, which would include the ankle bracelet, but I don't know if that's possible or not.

THE COURT: All right. Thank you.

I will invite the Pretrial Services officer to come forward and update us on anything you know.

PRETRIAL SERVICES: Definitely, Your Honor. Thank you again. This is Vaughn Wilson with Pretrial Services.

As the Court is aware, we made numerous calls to the Western District of North Carolina to – I'm sorry –

I'm sorry – to ascertain if they would accept the defendant back on courtesy supervision. They were unwilling to do so at a certain point, with some assertion they were – they said they would consider placing him back on GPS, and so that's where we are right now.

They want Mr. Class to know that, as part of your conditions of release, you will maintain the GPS bracelet. There will also be numerous home visits. And they would like for you to comply when there is an officer at your home. And if you're required to come in for any visit, that you are readily available to comply with those conditions of release.

[40] From what I understand, it was a bit frustrating in the beginning to try to have Mr. Class comply. When they went to the home, it was a bit frustrating. He didn't seem too enthused about them being here.

So that was one of their issues with placing him back on electronic monitoring. But they agreed to do so, Your Honor, with other conditions as well, and I believe you do have the order, Your Honor.

THE COURT: All right. Thank you very much. I appreciate it.

What I'm going to do is do two things. I'm going to grant the request that Mr. Class be released, and I'm going to do so under the following conditions: I'm going to reinstate the conditions that are imposed under the high-intensity supervision program. He will have to report as directed to the United States Pretrial Services Agency for the Western District of North Carolina, and

live at the address provided earlier in the case. He will be prohibited from possessing any firearms or destructive devices or other weapons. And any firearms have to be surrendered within 24 hours of his return to North Carolina.

He's to stay in North Carolina unless he comes up to D.C. for court matters. And he's to stay outside of the District of Columbia, unless he's ordered to be back here.

He will be required to have the ankle bracelet [41] placed back on him and be subject to GPS location monitoring, and pay amounts anywhere from 50 to $100 for that monitoring, as he's able to, and comply with any request from the Pretrial Services office for a list of any weapons that he may have.

I'll also impose an unsecured surety bond upon the gentleman who was kind enough to come up to agree to take you back to Virginia and assure your return to North Carolina. And I assume he's also, or someone will be, assuring that you're back here for sentencing.

I'll also hear from you, if you wish to say anything more, Mr. Class, and we will set a date for that sentencing in just a moment.

But having announced what those conditions are, if you wanted to respond in any way, I'll let you do that now. If you don't want to say anything, that's fine as well.

THE DEFENDANT: All right. I'll just sit still.

THE COURT: All right.

But just a word from this bench.

The Pretrial Services officers have an obligation. If they come to the house and they have to do the job just to check on you and to check on weapons and so forth, you don't want to get in any trouble, just let them come in and let them do their job. Everything will be fine until you come back up here.

[42] THE DEFENDANT: (Raised hand.)

THE COURT: Yes, sir.

THE DEFENDANT: Oh, I never had any problem with Jarold Patton. He's always welcome in the house; he's walked up through. I've always called him on Wednesday at about 9:00 in the morning. So I never had any problems with him.

The only thing that we may have had is the monitor may have got jiggled because my wife, being wobbly, bumped up against where we were sitting at, or my granddaughter playing, bumping up against it. Other than that, I don't know whatever issues we had.

THE COURT: Well, I'll take you at your word, but you'll probably have a different officer supervising you this time. And whoever that is, just let the officer do his or her job, and you'll be fine. It sounds like that office had a different view from the view you have, but you got a new shot.

As long as you do what you're supposed to do and you comply with these conditions and you let the Pretrial Services officers do what they have to do, you'll be fine, because you don't want to be back in a situation where we have to issue another warrant for you to bring you back up here in chains. I don't want that, you don't want that, I'm sure your wife doesn't want that.

[43] THE DEFENDANT: No.

THE COURT: So let everybody do what they have to do, comply with the conditions, and we'll be back here fine.

THE DEFENDANT: All right. No problem.

THE COURT: All right. You can have a seat. Counsel, let me ask you all to come up and we'll do some scheduling.

What I'd like to do is to schedule sentencing for February 4th, order a presentence investigation, where we'll have a final one due by January 23rd, and a deadline for all sentencing memos and other motions due by January 30th. How does that work for you all?

MR. PEARLMAN: That's fine for the government. Is that a Monday?

THE COURT: The 9th of February.

MR. KRAMER: Did you say the 4th of February? I'm sorry. Did you say the 4th or the 9th?

THE COURT: I meant to say the 9th, if I said the 4th, but that is a Monday.

MR. KRAMER: The 9th is fine, I'm sorry. Yeah, I thought it was the prior week. The 9th is perfect. Thank you.

MR. PEARLMAN: What time on the 9th?

THE COURT: 10 a.m.?

MR. PEARLMAN: Thank you, Your Honor.

[44] THE COURT: All right. We'll schedule sentencing for February the 9th, 2015, at 10:00 a.m.

I'll order a presentence report – presentence investigation, with a final report due on January 23rd, and any motions to be filed will have to be filed by January 30th, all of those in the year of 2015.

We'll order conditions of release under the High Intensity Supervision Program.

I'll also order that an unsecured surety bond be imposed in the amount of $1,000, naming –

MR. KRAMER: Robert H-o-f-f, Hoff.

THE COURT: – Mr. Robert Hoff. And we'll have to have him come forward to execute that as well.

Mr. Smith.

(Pause)

MR. KRAMER: And, Your Honor, just – I think Your Honor indicated it was okay, but I just want

to check and make sure that, tonight and into tomorrow, he can stay in the District of Virginia, Eastern District of Virginia until he meets his wife. And then by tomorrow, he'll be back home.

I know Your Honor had ordered to keep – I mean, ordered that he be in the, I guess, that's the Western District of North Carolina. But at least for tonight and tomorrow.

[45] THE COURT: Yes. I'll allow that period for transport between here and North Carolina.

MR. KRAMER: Thank you.

Is that it for Mr. Hoff, Your Honor?

THE COURT: As soon as I look at the form, it may be.

DEPUTY CLERK: Mr. Class.

THE COURT: Thank you, Mr. Hoff.

DEPUTY CLERK: Mr. Class, would you stand, please. Step forward and raise your right hand.

Raise your right hand, please.

(Defendant is placed under oath.)

DEPUTY CLERK: Thank you.

THE COURT: All right. Mr. Class, you are due back in court, as it indicated on that form, on February 9th, 2015, at 10:00 a.m. If you fail to appear as required, it's a separate criminal offense for which you

could be prosecuted and sentenced to imprisonment. All of the conditions on which you're being released continue to apply until that time, and penalties for violating those conditions can be severe.

If you commit any crime while you're on release, it could subject you to more severe punishment than you would have received for that crime if you had not been under release conditions. Do you understand those things?

[46] THE DEFENDANT: Yes.

THE COURT: Counsel, anything further we need to take up?

MR. KRAMER: No, Your Honor.

THE COURT: Anything further?

MR. PEARLMAN: No, Your Honor.

THE COURT: All right. Thank you very much, and you may be excused. We'll see you back in February.

THE DEFENDANT: Okay.

THE COURT: All right.

(Proceedings concluded at 3:25 p.m.)

[47] CERTIFICATE

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: October 28, 2015 /S/ William P. Zaremba
William P. Zaremba,
RMR, CRR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
v.	**Criminal Action No. 13-253 (RWR)**
RODNEY CLASS,	
Defendant.	

ORDER

(Filed Jan. 28, 2015)

Pro se defendant Rodney Class has submitted what can be liberally construed as a motion to dismiss the superseding indictment to which he pled guilty.[1] From what can be discerned from the rambling text, he appears to make at best the following arguments: 1) The prosecutor and his stand-by appointed counsel did not proceed in good faith by having him plead guilty in a case that originally included a charge under a statute that was held unconstitutional; and 2) "Rodney Class" is an artificial entity and not an actual, living party. Def.'s Mot. for Discharge & Termination at 1-3.

[1] Although the defendant has been barred from filing documents on the docket unless they are reviewed and submitted through stand-by counsel, *see* 9/23/14 Order, the court will grant leave to have this document filed.

The charge that appeared in the original indictment under the statute that was later held unconstitutional was dismissed on September 9, 2014 on the government's motion [#134]. The charge in the superseding indictment to which Class pled guilty on November 11, 2014 has not been held unconstitutional. And whatever Class' suspicions may be about the good or bad faith of the lawyers in this case, this Court conducted an extensive colloquy with Class under Federal Rule of Criminal Procedure 11, and found that Class was competent and capable of making a decision, that he understood the nature and consequences of what he was doing, that he entered his plea knowingly and voluntarily and of his own free will, and that there was a factual basis for his entering a plea of guilty. In addition, it was indeed an actual living Rodney Class, not an artificial entity, who entered the guilty plea. Accordingly, it is hereby

ORDERED that the defendant's motion be, and hereby is, DENIED.

SIGNED this 26th day of January, 2015.

/s/
RICHARD W. ROBERTS
Chief Judge

RECORD AND BRIEFS.

Supreme Court, U.S.
FILED
MAY 12 2017
OFFICE OF THE CLERK

No. 16-424

IN THE

Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), this Court held that a defendant who pleads guilty can still raise on appeal any constitutional claim that does *not* depend on challenging his "factual guilt." In *Blackledge* and *Menna*, the Court held that double jeopardy and vindictive prosecution are two such claims that are not inherently resolved by pleading guilty, because those claims do not challenge whether the government could properly meet its burden of proving each element of the crime.

In the years since this Court decided *Blackledge* and *Menna*, the circuit courts have deeply divided on whether a defendant's challenge to the constitutionality of his statute of conviction survives a plea, or instead is inherently waived as part of the concession of factual guilt.

The question presented is:

Whether a guilty plea inherently waives defendant's right to challenge the constitutionality of his statute of conviction.

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INTRODUCTION

Plea bargaining today is not just "some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 133, 144 (2012) (emphasis in original) (quotation marks omitted). The default rules of plea bargaining "determine[] who goes to jail[,] for how long," and for what crimes. *Id.* (quotation marks omitted). This case asks the Court to answer a question regarding the application of these default rules: whether a defendant who has not expressly waived the right to challenge on appeal the constitutionality of his statute of conviction nonetheless inherently waives this right merely by pleading guilty.

The answer to that question is no. In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), this Court held that where a defendant pleads guilty, but then asserts a right that would have prevented the government from prosecuting him at all—such as the right not to be vindictively prosecuted or to be put into double jeopardy—the assertion of that right is not inherently waived or foreclosed by the guilty plea. A defendant's right not to be convicted pursuant to an unconstitutional statute plainly falls into this category. As this Court recognized more than a century ago and reaffirmed as recently as last year, "'an unconstitutional law is void, and is as no law,'" and any penalty imposed pursuant to that law "is, by definition, unlawful." *Montgomery v. Louisiana*, 136 S. Ct. 718, 730-31 (2016) (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)).

Unlike core trial rights (like the right to cross-examine witnesses), and procedural and evidentiary rights (like rights under the Fourth Amendment), which

may be waived by a guilty plea or foreclosed because of a defendant's admissions in the plea, a challenge to the constitutionality of the statute of conviction goes to the very power of the government to prosecute the defendant. The default rule is that a defendant's ability to raise such a challenge does not automatically disappear merely because the defendant has chosen to admit he engaged in conduct that he asserts is constitutionally protected.

The government and the court below argue for a different default rule, claiming that a guilty plea *does* inherently waive a defendant's right to raise a constitutional challenge to the statute of conviction on appeal, unless the defendant expressly preserves his right to bring that challenge by entering a conditional plea pursuant to Federal Rule of Criminal Procedure 11(a)(2). Rule 11(a)(2) permits the defendant to reserve in writing the right to appeal a conviction on specified grounds if the defendant is able to secure the approval of the prosecutor and the court. But, as its drafters explicitly noted, Rule 11(a)(2) does not displace this Court's decisions in *Blackledge* and *Menna*, which make clear that a challenge to the State's very power to bring the prosecution is preserved regardless of whether the defendant enters a conditional guilty plea.

Petitioner's interpretation of the default rules is dictated by this Court's precedent. But even if it were not, Petitioner's is the only interpretation that makes sense. There is no reason to leave unconstitutional criminal statutes on the books and unchallenged, which is where they will remain if defendants who plead guilty—the vast majority of defendants in the criminal

justice system—bear the burden of obtaining the permission of the prosecutor to reserve the right to bring a constitutional challenge on appeal. That rule would not only chill constitutionally protected conduct; it would also lead to a substantial waste of resources as defendants pursue unnecessary trials in which no factual disputes are at issue in order to challenge the constitutionality of their statutes of conviction. This Court should reaffirm its prior decisions and hold that a guilty plea does not inherently waive a post-plea challenge to the constitutionality of the statute of conviction.

OPINIONS BELOW

The July 5, 2016, opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a) is unpublished. The District Court for the District of Columbia's October 27, 2014 oral order denying Petitioner's motion to dismiss the indictment (Pet. App. 6a) is unreported. The district court's April 16, 2014 memorandum order denying in part Petitioner's motion to dismiss the indictment (Pet. App. 10a) is reported at 38 F. Supp. 3d 19.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit entered its judgment on July 5, 2016. The petition for writ of certiorari was timely filed on September 30, 2016 and granted on February 21, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. V, and 40 U.S.C. §§ 5101, 5102, 5104, and 5109. These provisions are reproduced in the Petition Appendix at 17a.

STATEMENT

I. Factual Background

Petitioner is a retired veteran who resides in North Carolina and has a concealed-carry permit from that State. *See* D.C. Cir. J.A. 30, 50, 101, 130.[1] On Thursday, May 30, 2013, Petitioner was driving from Virginia to Pennsylvania when he stopped en route to visit the U.S. Capitol. *Id.* at 57, 102, 162. Petitioner parked his Jeep on the 200 block of Maryland Avenue, SW, which is located just north of the United States Botanic Garden and approximately 1,000 feet from the entrance to the Capitol building. *Id.* at 162 ¶ 1. The parking lot is publicly accessible, but a permit is usually required to park there on weekdays. *Id.* at 101, 128. Although Petitioner did not know it at the time he parked there, the parking lot is statutorily included within the Capitol Grounds, where all weapons are prohibited pursuant to 40 U.S.C. § 5104(e). It is undisputed that there was no sign stating that the parking lot was part of the Capitol Grounds or that weapons were prohibited there. *Id.* at 125 n.1.

Petitioner's Jeep contained several lawfully-owned firearms. *See id.* at 130. After parking, Petitioner locked

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[1] Citations to "D.C. Cir. J.A." refer to the Joint Appendix filed in the D.C. Circuit on November 20, 2015.

his vehicle, leaving those firearms inside, secured out of sight. *See id.* at 162-63. He then proceeded, unarmed, to visit the House and Senate buildings. *Id.* at 125. Approximately an hour later, a Capitol Police officer noticed that Petitioner's Jeep had North Carolina plates, and she determined that it did not have a parking permit on the front windshield. *Id.* She also noticed what appeared to be a large blade strapped to a roller bar inside the vehicle and what appeared to be an empty gun holster in the map pocket of the driver's side door. *Id.*

The officer determined that the Jeep was registered to Petitioner, and she radioed for additional officers to assist her. *Id.* When Petitioner returned to his vehicle later that afternoon, he confirmed to the officers that he owned the Jeep, and he freely admitted that there were weapons inside the vehicle, for which he had lawful permits. *Id.* The officers informed Petitioner that it was "illegal to have weapons on Capitol grounds" and arrested him. *Id.* at 126. They transported him to Capitol Police headquarters and subsequently searched his Jeep pursuant to a warrant. *Id.* at 103. The search recovered three firearms, stored out of sight, as well as several knives. *Id.*

II. Petitioner Challenges The Constitutionality Of 40 U.S.C. § 5104(e) In The District Court.

Petitioner was charged in the U.S. District Court for the District of Columbia with one count of violating 40 U.S.C. § 5104(e), which makes it a crime to "carry on or have readily accessible to any individual on the [Capitol] Grounds or in any of the Capitol Buildings a firearm . . ."

40 U.S.C. § 5104(e)(1)(A)(i); *see also* J.A. 20-21.[2] Petitioner was also charged with violating D.C. Code § 22-4504(a), which prohibited carrying a pistol in public without a license, but that charge was later dropped after § 22-4504(a) was declared unconstitutional. *See Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014); J.A. 22.

On August 15, 2013, Petitioner voluntarily testified before a grand jury. D.C. Cir. J.A. 127. Petitioner explained that he had previously parked in the same spot without issue, that he was not aware he had parked within the Capitol Grounds, and that there was no sign indicating the area was restricted. *Id.* at 128-29. Petitioner testified that he did not notice any sign indicating a permit was required to park in that lot until Capitol Police pointed it out to him. *Id.* at 129. Petitioner was nonetheless indicted. J.A. 20.

Representing himself *pro se*, with appointed stand-by counsel, Petitioner filed numerous motions to dismiss the indictment, arguing *inter alia* that his storage of lawfully-owned weapons inside his locked vehicle was protected by the Second Amendment. For example, Petitioner argued that "[t]he 2nd Amendment to our Constitution states that 'the Right of the People to keep and bear Arms, shall not be infringed,'" and accordingly "there can be no legislation which would abrogate (abolish) them." D.C. Cir. J.A. 32-33 (emphasis omitted); *see also id.* at 36, 42-43, 46. He also raised a due process notice claim, arguing that he had not been given fair warning that weapons were banned in the parking lot,

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[2] Citations to "J.A." refer to the Joint Appendix filed with this brief.

which was freely accessible to the public. *See id.* at 39, 128. Petitioner presented argument on these motions at a hearing held April 7, 2014. He contended that his conduct had been "well within [his] protected rights of [the] Second Amendment," *id.* at 69, and that he had no way of knowing weapons were forbidden where he parked, *id.* at 65.

The court ordered the government to file responsive briefing on the Second Amendment issue. *See id.* at 92. The government extensively addressed the question of whether the Second Amendment, as interpreted by this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), prohibited Petitioner's prosecution. *See* D.C. Cir. J.A. 106-13. The government argued that all government property is inherently a "sensitive place" where there is no right to armed self-defense under the Second Amendment. *Id.* at 112.

The government also filed motions that addressed many of the due process notice arguments Petitioner had raised. The government argued that there could be no notice or warning concerns because: (1) § 5104(e) has no "knowledge and/or intent requirements" (*i.e.*, the statute has "no ... *mens rea* element"), *id.* at 124, 130; and (2) the statute defining the Capitol Grounds makes a "clear reference" to the relevant parking lot when it designates "all grounds bounded by the curblines of First Street, Southwest on the east; Washington Avenue, Southwest to its intersection with Independence Avenue, and Independence Avenue from such intersection to its intersection with Third Street, Southwest on the south; Third Street, Southwest on the

west; and Maryland Avenue, Southwest on the north," 40 U.S.C. § 5102(c)(1)(C), as being part of the Capitol Grounds, D.C. Cir. J.A. 138.

On October 27, 2014, the district court orally denied Petitioner's claim that his Second Amendment rights had been violated, concluding that a government-owned parking lot was the same as a "government building[]," where all weapons could presumptively be banned. Pet. App. 9a. The court also declined to accept Petitioner's due process notice argument.

III. Petitioner Pleads Guilty.

Petitioner's case was set for trial, but he sent a letter to the court indicating that he would be unable to appear. D.C. Cir. J.A. 145. Subsequently, he pled guilty to the charge of violating § 5104(e). The plea conceded Petitioner's factual guilt—that he had violated § 5104(e) by parking his vehicle, which contained several firearms and knives, within the area statutorily designated as the Capitol Grounds. *See* J.A. 24-26, 30-31. The plea agreement expressly waived Petitioner's trial rights, as well as Petitioner's right to appeal his sentence or to collaterally attack his conviction or sentence—unless he claimed the sentence was above the statutory maximum or guidelines range determined by the court, or unless his collateral attack was based on newly discovered evidence or a claim of ineffective assistance of counsel. *See id.* at 39-41. The plea agreement did not, however, contain any express waiver of the right to directly appeal the conviction, nor did it concede in any way that § 5104 itself was constitutional. *See id.* at 30-31, 38-41. The plea agreement also included an integration clause stating that the plea comprised the "[c]omplete

[a]greement" between the parties and that no "promises, understandings, or representations have been made . . . other than those contained in writing herein." *Id.* at 45.

At the plea colloquy on November 21, 2014, the district court reviewed with Petitioner the rights waived by the plea agreement. *Id.* at 54, 61-79. As part of that review, the court explained to Petitioner that he retained the right to "appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." *Id.* at 63. Petitioner agreed that he was willing to give up "most of [his] rights to an appeal . . . [o]ther than what [the court] mentioned." *Id.* at 66.

IV. The D.C. Circuit Holds That A Plea Inherently Waives All Constitutional Claims.

Four days after he was sentenced, Petitioner filed a notice of appeal with the D.C. Circuit. *See* D.C. Cir. J.A. 24-25. He then filed a *pro se* opening merits brief, focusing on his claim that his Second Amendment rights had been violated. *See* J.A. 16-17. The government did not move to dismiss the appeal as being either waived or foreclosed by Petitioner's guilty plea, nor did it otherwise respond in any manner to Petitioner's brief. Approximately seven months later, the D.C. Circuit set a new briefing schedule and appointed counsel to serve as amicus curiae to argue in favor of Petitioner. *Id.* at 17.

Amicus fully briefed the primary constitutional challenges that Petitioner had raised at the district court, and Petitioner expressly adopted amicus's arguments as his own. *See id.* at 18. Petitioner argued

that the Second Amendment protects the right to "keep and bear arms" for self-defense, and that § 5104(e) infringes on that right by effectively banning law-abiding citizens from securely storing lawfully-owned weapons in their vehicles parked in a publicly accessible lot. Amicus D.C. Cir. Br. 22, 25. Petitioner also argued that § 5104(e), both facially and as-applied, violates the Due Process Clause because it fails to give fair warning as to what areas are considered the Capitol Grounds where weapons are banned. *Id.* at 54-56. And further, Petitioner argued, the lack of any notice, especially when combined with the government's argument that § 5104(e) has no *mens rea* requirement, violates due process. *Id.* at 55.

In response, the government argued—for the first time, nearly one year after Petitioner had filed his opening brief—that even though Petitioner's plea did not contain any express waiver of the right to appeal his conviction, the plea *inherently* waived Petitioner's right to raise any constitutional claims that accrued before he pled guilty, including his constitutional challenges to the statute. *See* Gov't D.C. Cir. Br. 28 & n.15. The government therefore urged the D.C. Circuit not to reach the merits of Petitioner's claims on appeal.

Petitioner countered that because the plain terms of his plea agreement did not include a waiver of his right to directly appeal with a constitutional challenge to the statute of conviction, the court should not interpret the contract between the parties to waive that right. Amicus D.C. Cir. Reply 1-8. Petitioner further argued that his constitutional challenges survived his guilty plea pursuant to this Court's holdings in *Blackledge v. Perry*,

417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975). Amicus D.C. Cir. Reply 8-13.

In *Blackledge*, a state prosecutor charged a defendant with felony assault with a deadly weapon after the defendant appealed his conviction of a lesser-included offense. 417 U.S. at 22-23. The defendant pled guilty to the charge but later filed a habeas petition alleging that the felony indictment constituted vindictive prosecution in violation of his due process rights. *Id.* at 23-26. The Court held that the defendant's guilty plea did not foreclose his due process claim because, as opposed to claims that could be "cured" by the government, the *Blackledge* defendant's claim "went to the very power of the State to bring the defendant into court to answer the charge brought against him." *Id.* at 30. If the defendant had succeeded with his vindictive prosecution claim, it would have had the "practical result" of "prevent[ing] a trial from taking place at all." *Id.* at 30-31 (internal quotation marks omitted). In other words, the State was categorically "forbid[den]" from "bring[ing] [the] more serious charges against the defendant" because of the "sufficiently serious due process concerns" raised by "the potential for prosecutorial vindictiveness." *United States v. Broce*, 488 U.S. 563, 574-75 (1989) (citing *Blackledge*, 417 U.S. at 30-31).

Similarly, in *Menna*, this Court held that pleading guilty does not preclude a defendant from subsequently raising a double jeopardy claim where "judged on its face the charge is one which the State may not constitutionally prosecute." 423 U.S. at 62 n.2. That is because, in such a circumstance, "the State may not

convict" the defendant "no matter how validly his factual guilt is established." *Id.* *Menna* further clarified that a guilty plea does not "inevitably 'waive' all antecedent constitutional violations," but rather represents the defendant's concession of his "factual guilt." *Id.* Thus, the plea "renders irrelevant" any claim that depends on challenging the government's evidence of guilt, *i.e.*, those claims that "do not stand in the way of conviction, if factual guilt is validly established," such as procedural defects or Fourth Amendment violations. *Id.*; *see Blackledge*, 417 U.S. at 30. By contrast, where "the claim is that the State may not convict [the defendant] no matter how validly his factual guilt is established"—that is, where the defendant contends that "the charge is one that the State may not constitutionally prosecute" *at all*—"[t]he guilty plea . . . does not bar the claim." *Menna*, 423 U.S. at 62 n.2.

As Petitioner explained to the D.C. Circuit, his constitutional challenges to § 5104 were akin to the claims the Court held were not inherently precluded by guilty pleas in *Blackledge* and *Menna*. Like the defendants in those cases, Petitioner was not challenging his "factual guilt": he did not contest whether the government could show, for example, that Petitioner's car was parked on the Capitol Grounds, or that it contained firearms. Amicus D.C. Cir. Reply 9, 12. Rather, Petitioner asserted that even assuming the elements of the statute were satisfied, he *still* could not be validly prosecuted or convicted because § 5104 itself was unconstitutional both on its face and as applied to his particular circumstances. *See id.* at 15, 27. Thus, Petitioner argued that under *Blackledge* and *Menna*,

the court should reach the merits of his Second Amendment and due process challenges to the statute. *Id.* at 13-14.

After oral argument, the D.C. Circuit affirmed Petitioner's conviction, refusing to address the merits of any of his constitutional claims. Pet. App. 1a-5a. The court acknowledged that Petitioner's plea agreement did not include any "explicit waiver of appeal rights . . . as to alleged errors in the indictment or in proceedings before the sentencing." *Id.* at 4a. The court nonetheless held that simply by entering a guilty plea, Petitioner had inherently waived his right to bring an appeal challenging the constitutionality of the statute under which he was convicted. *Id.* at 3a.

The court's holding was based on two premises. *First*, the court cited this Court's decision in *Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973), for the "universally recognized law" that a guilty plea inherently "waive[s] the pleading defendant's claims of error on appeal, even constitutional claims." *Id.* at 3a-4a (alteration omitted) (quoting *United States v. Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004)). The court did not acknowledge that this Court's later decisions in *Blackledge* and *Menna* expressly rejected this reading of *Tollett*. *Blackledge*, 417 U.S. at 30-31; *Menna*, 423 U.S. at 62 n.2. In particular, the D.C. Circuit did not address *Menna*'s statement that *Tollett* does not "stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations," but rather stands for the proposition that a valid guilty plea admits factual guilt and thus removes that issue from the case. 423 U.S. at 62 n.2.

Second, the D.C. Circuit stated that where a defendant pleads guilty and does not expressly "reserv[e] in writing the right to have an appellate court review an adverse determination of a specified pretrial motion" pursuant to Federal Rule of Criminal Procedure 11(a)(2), the only claims that can be raised on appeal are "the defendant's claimed right not to be haled into court at all," and a claim "that the court below lacked subject-matter jurisdiction over the case." Pet. App. 4a (quoting *Delgado-Garcia*, 374 F.3d at 1341). The court found neither category relevant to Petitioner and therefore refused to reach the merits of his claims regarding the unconstitutionality of § 5104. *Id.*

SUMMARY OF ARGUMENT

1. Petitioner's guilty plea did not expressly waive his right to directly appeal his conviction or to challenge the constitutionality of the statute under which he was convicted. Under the principles of contract law that generally govern guilty pleas, that should be the end of the matter: a court should not read into the parties' contract a term to which they did not agree.

The government and the court below nonetheless take the position that Petitioner's guilty plea *inherently* waived his right to challenge his statute of conviction. This Court's cases dictate otherwise. In a series of decisions, this Court has repeatedly and clearly distinguished between trial rights that can be waived, procedural or evidentiary claims that can be rendered irrelevant, and claims that go to the State's very power to prosecute the defendant for the crime alleged, which are neither waived nor rendered irrelevant by a voluntary, knowing, and intelligent guilty plea.

Petitioner's claim that he was convicted under an unconstitutional statute falls in this last category. Petitioner attacks the State's very power to validly prosecute and convict him; he does not take issue with his failure to receive a trial, or with the procedures by which the government might have attempted to convict him. Simply put, Petitioner's claim is that, no matter what procedures the government employed or what evidence the government amassed, the government could not validly prosecute and convict him for the crime alleged. Under this Court's precedent, Petitioner's mere act of pleading guilty does not waive or foreclose that claim.

The Court has drawn a similar line in its retroactivity jurisprudence. In that context, the Court has recognized that because a decision invalidating a criminal statute as unconstitutional leaves no valid basis for a prisoner's conviction, it is a "substantive" rule that should apply retroactively to cases on collateral review, even though most new "procedural" rules do not.

2. The court below failed to appreciate the distinction between different types of rights implicated by a guilty plea and held instead that a defendant cannot seek to invalidate his voluntary, knowing, and intelligent plea based on *any* alleged constitutional violation unless he has secured the permission of the prosecutor and the court to enter a conditional plea pursuant to Federal Rule of Criminal Procedure 11(a)(2). But as that Rule's drafters made clear, the Rule has no applicability when the alleged constitutional violation would render it impossible for the government to obtain or sustain the conviction. Although the drafters also referred to the

"jurisdictional" nature of such claims, the drafters were using the term in a less-than-meticulous manner: a defendant is not limited to raising post-plea only those claims that implicate subject-matter or personal jurisdiction. Nor should a defendant be limited to raising only facial challenges to the statute under which he is convicted when an as-applied challenge would likewise bar a prosecution from ever taking place.

3. This Court should hold, as its precedent compels, that a guilty plea does not inherently waive or foreclose a defendant's right to challenge the constitutionality of his statute of conviction. If this Court holds otherwise, it should remand for a determination of whether Petitioner's plea was actually voluntary, knowing, and intelligent—an argument that Petitioner raised below, but the Court of Appeals failed to address.

ARGUMENT

I. Defendants Do Not Inherently Waive The Ability To Challenge The Constitutionality Of The Statute Of Conviction By Pleading Guilty.

Although courts disfavored plea agreements for many decades, *see, e.g.*, Albert W. Alschuler, *Plea Bargaining And Its History*, 79 Colum. L. Rev. 1, 5, 19-24 (1979), "the reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). As of 2012, approximately "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions [were] the result of guilty pleas." *Id.*; *see also Brady v. United States*, 397 U.S. 742, 752 n.10 (1970) (noting that by 1970, it "ha[d] been estimated that about 90%, and

perhaps 95%, of all criminal convictions [were] by pleas of guilty," including "between 70% and 85% of all felony convictions"). Given that the vast majority of criminal cases today are resolved through plea agreements, this Court has addressed the contours and consequences of guilty pleas on numerous occasions.

This Court has explained that plea agreements are essentially contracts, and thus must be enforced as written. Where, as here, the defendant has not expressly waived his right to bring a direct appeal challenging the constitutionality of the statute of conviction, the plea may be read to waive that right only if there is a default rule that the mere act of pleading guilty inherently precludes such challenges. This Court's cases make clear that no such default rule exists. In so doing, they draw a line between rights that are rendered irrelevant by the defendant's voluntary, knowing, and intelligent admission of factual guilt, and thus cannot be subsequently raised as a basis to invalidate the conviction, and rights that call into question the government's power to validly convict the defendant of the crime alleged.

This line is analogous to the line the Court has drawn in its retroactivity jurisprudence, in which the Court has held that decisions that invalidate the statute of conviction on constitutional grounds are substantive rules that must apply retroactively because they implicate the government's power to hold the defendant at all. The same reasoning applies in the context of guilty pleas: a constitutional challenge to the statute of conviction questions the State's power to hold the defendant at all, no matter how perfect the procedures

it employs or how strong the evidence of factual guilt. It therefore survives a guilty plea.

A. It Is Undisputed That Petitioner's Guilty Plea Did Not Expressly Waive His Right To Challenge The Constitutionality Of The Statute Of Conviction.

"Plea bargains are essentially contracts." *Puckett v. United States*, 556 U.S. 129, 137 (2009); *accord* U.S. Dep't of Justice, U.S. Attorneys' Manual, Criminal Resource Manual § 626(2) ("A plea bargain is a contract between the prosecutor and the defendant" that "will depend upon the precise language used."). Consequently, plea agreements should ordinarily be interpreted in accordance with contract principles. Absent "mistake, fraud, unconscionability, or another invalidating cause," a court "must enforce [a contract] as drafted by the parties." 11 Richard A. Lord, *Williston on Contracts* § 31:5, at 461 (4th ed. 2012). This "general rule . . . prevents a court from adding terms or provisions to the contract." *Id.* § 31:6. Additionally, as in the case of statutory interpretation, when a contract contains "a series of two or more terms or things that should be understood to go hand in hand," the "sensible inference" is that "the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002); *see also* 5 Margaret N. Kniffin, *Corbin on Contracts* § 24.28, at 315-16 (Joseph M. Perillo ed., rev. ed. 1998) (affirming the applicability of the *expressio unius* canon to contracts).

As both the government and the D.C. Circuit have acknowledged, Petitioner's plea agreement did not expressly waive his right to challenge the

constitutionality of the statute of conviction on appeal. Pet. App. 4a; *see also* Gov't D.C. Cir. Br. 16 (arguing that "it is not necessary for the plea agreement to contain an explicit waiver of appellate review" of claims that the statute of conviction is unconstitutional). Petitioner's plea agreement includes an "explicit waiver of appeal rights as to sentencing errors," but no explicit waiver of appeal rights as to the constitutionality of the statute of conviction, § 5104(e). Pet. App. 4a; J.A. 40-41. Indeed, Petitioner's plea agreement includes an entire section on "Appeal Rights" that describes the waived appeal rights in great detail, but does not include any mention of appeal rights as to Petitioner's conviction, or as to the constitutionality of § 5104(e). J.A. 40-41. In the courts of appeals, "there are numerous examples of appellate waivers that clearly encompass both the defendant's right to appeal his sentence *and* his right to appeal his conviction." *United States v. Spear*, 753 F.3d 964, 968 (9th Cir. 2014) (emphasis in original). Not so here.

To hold that Petitioner waived his right to challenge the constitutionality of the statute of conviction on appeal, this Court therefore would have to read an implicit waiver into the explicit terms of the parties' contract—it would have to hold, as the government argued below, that despite Petitioner's failure to explicitly waive his right to appeal his conviction on the grounds that the statute under which he was convicted was unconstitutional, "the guilty plea itself effects a waiver as a matter of law." Gov't D.C. Cir. Br. 16. As discussed below, such a reading of the plea agreement would be inconsistent with the default rules governing

guilty pleas set forth in decades of this Court's precedent.

B. A Constitutional Challenge To The Statute Of Conviction Calls Into Question Whether The Government Can Ever Obtain A Valid Conviction, And Therefore Is Not Waived Or Foreclosed By A Guilty Plea.

1. In establishing the default rules governing guilty pleas, the Court has generally divided the rights at issue into three categories. *First*, there are constitutional rights that simply "inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accuser." *Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)); *United States v. Ruiz*, 536 U.S. 622, 628-29 (2002). The default rule is that these basic trial rights are automatically waived by a guilty plea so long as that plea is voluntary, knowing, and intelligent: because a guilty plea forecloses the possibility of a trial, it necessarily forecloses the assertion of the associated constitutional trial rights. *See, e.g., Boykin v. Alabama*, 395 U.S. 238, 243 & n.5 (1969). However, the assertion of appellate rights does not fall within this category, because an appeal "cannot in any way be characterized as part of the trial." *Lafler*, 566 U.S. at 165.

Second, there are procedural rights that inhere in a criminal prosecution, but are rendered irrelevant (rather than waived) by a valid guilty plea. These rights include, for example, the Fourth Amendment's protection against unreasonable searches and seizures, *Haring v. Prosise*, 462 U.S. 306, 320-21 (1983); the Fifth

Amendment's guarantee against involuntary confessions, *McMann v. Richardson*, 397 U.S. 759, 771-72 (1970); and the Fourteenth Amendment's safeguard against racial discrimination in grand jury selection, *Tollett*, 411 U.S. at 266-68. These are fundamental constitutional protections that a defendant is ordinarily entitled to rely upon, but that become irrelevant after a defendant pleads guilty and thereby admits his factual guilt. The default rule with respect to this class of rights is that they cannot be asserted after a defendant has entered a voluntary, knowing, and intelligent guilty plea.

In *Tollett v. Henderson*, 411 U.S. 258 (1973), and in the so-called "*Brady* trilogy" of *Brady v. United States*, 397 U.S. 742 (1970), *McMann v. Richardson*, 397 U.S. 759 (1970), and *Parker v. North Carolina*, 397 U.S. 790 (1970), this Court explained that when a defendant pleads guilty, his right to assert that a violation of these procedural rights should invalidate his conviction is necessarily foreclosed. Because a criminal defendant has voluntarily, knowingly, and intelligently admitted his factual guilt—*i.e.*, he has "solemnly admitted in open court that he is in fact guilty of the offense with which he is charged"—he may not invalidate the plea based on mere procedural defects that the government could have remedied through different pre-trial procedures. 411 U.S. at 267-68. This is because such procedural defects might "only [have] delay[ed] the inevitable date of prosecution" rather than prohibited it entirely. *Id.*

Unlike the core trial rights in the first category that are inherently waived by a guilty plea, the procedural rights in this second category are not "waived" at all.

Rather, the concept at issue is akin to forfeiture. "A guilty plea represents a break in the chain of events which has preceded it in the criminal process," such that it forecloses further inquiry into most constitutional deprivations that occurred before the plea. *Id.* at 267-68. This Court has therefore held that "when a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by" procedural or evidentiary errors like "an alleged Fourth Amendment violation because the conviction" rests on the defendant's admission of guilt, not "on evidence that may have been improperly seized." *Haring*, 462 U.S. at 321.

Finally, there are rights that go to the very power of the government to bring the prosecution and secure the conviction at all. These include, for example, the Fifth Amendment rights not to be put into double jeopardy or to be vindictively prosecuted. As this Court explained in *Blackledge* and *Menna*, these rights go to "the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge*, 417 U.S. at 30. The default rule with respect to these rights is that they are neither waived nor foreclosed by the act of pleading guilty.

The *Blackledge/Menna* rights in this third category are "fundamental[ly] distinct[]" from the *Tollett/Brady* rights in the second category, as this Court explained with the following illustration: "The defendants in *McMann v. Richardson*, for example, could surely have been brought to trial without the use of the allegedly coerced confessions, and even a tainted indictment of the sort alleged in *Tollett* could have been 'cured' through a

new indictment by a properly selected grand jury." *Blackledge*, 417 U.S. at 30. However, with respect to *Blackledge/Menna* rights, "the nature of the underlying constitutional infirmity is markedly different." *Id.* Defendants in this category are not "complaining of 'antecedent constitutional violations' or of a 'deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" *Id.* Instead, the right asserted is one "not to be haled into court at all upon the felony charge," having the "practical result" of "prevent[ing] a trial from taking place at all, rather than . . . prescrib[ing] procedural rules that govern the conduct of a trial." *Id.* at 30-31 (internal quotation marks omitted).

In *Menna*, this Court expanded upon this distinction between substantive rights that go to the very power of the State to bring the prosecution and procedural rights that do not, noting that with respect to the constitutional rights in the latter category, a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." 423 U.S. at 62 n.2. With respect to the rights in the former category, "the claim is that the State may not convict petitioner no matter how validly his factual guilt is established," because "the charge is one which the State may not constitutionally prosecute." *Id.*[3]

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[3] Judge Friendly summarized this Court's decisions in a similar manner. Reviewing *Blackledge*, *Menna*, *Tollett*, and the *Brady* trilogy, he described "the guiding principle of these decisions" as follows:

Most recently, this Court distinguished among these types of claims in *United States v. Broce*, 488 U.S. 563 (1989). The defendants in *Broce* pled guilty to two counts of conspiracy contained in two separate indictments, but later tried to raise a double jeopardy claim to vacate one of the conspiracy counts because a subsequent prosecution of a different defendant suggested that there may have been only one conspiracy. *Id.* at 566-67, 576. This Court declined to entertain the double jeopardy claim, emphasizing that it was "foreclosed by the admissions inherent in [defendants'] guilty pleas," including that the defendants entered into "two agreements which started at different times and embraced separate objectives." *Id.* at 571, 576.

In reaching this conclusion, the Court distinguished the double jeopardy claims at issue in *Broce* from the double jeopardy claims at issue in *Menna*. In *Broce*, the defendants could not "prove their claim without contradicting" the indictments to which they pled guilty, meaning that their claims were foreclosed under the

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> A defendant who has been convicted on a plea of guilty may challenge his conviction on any constitutional ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect. In other words, a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be cured.

United States v. Curcio, 712 F.2d 1532, 1538-39 (2d Cir. 1983) (alterations and internal quotation marks omitted).

logic of *Tollett* and the *Brady* trilogy. *Id.* at 576. By contrast, in *Menna*, "the indictment was facially duplicative of the earlier offense of which the defendant had been convicted"; the facts the defendant admitted could not "conceivably be construed" as anything other than "a redundant confession to the earlier offense" and thus, a double jeopardy violation. *Id.* at 575-76. *Broce* therefore follows the *Tollet/Brady* line of cases in finding that a guilty plea prohibits further inquiry into constitutional violations that become irrelevant once a defendant admits that he is guilty of facts the government may criminalize. At the same time, it reaffirms that under *Blackledge* and *Menna*, "a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute." *Id.* at 575 (emphasis in original) (quoting *Menna*, 423 U.S. at 62 n.2).

2. The right not to be prosecuted and convicted pursuant to an unconstitutional statute clearly falls into the *Blackledge/Menna* category of rights and is neither waived nor foreclosed automatically by a plea of guilty. Such a challenge goes to the government's very power to prosecute or convict a defendant. It, by contrast, does not concern the evidentiary disputes and procedural errors that formed the basis of the constitutional challenges in *Tollett* and the *Brady* trilogy.

As noted above, a guilty plea forecloses further inquiry only into "constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." *Menna*, 423 U.S. at 62 n.2. Here, however, Petitioner's claim is that the statute

under which he has been convicted is unconstitutional and thus "the charge is one which the State may not constitutionally prosecute"; in other words, "the State may not convict [Petitioner] no matter how validly his factual guilt is established." *Id.* "The guilty plea, therefore does not bar the claim." *Id.*

As this Court recently reaffirmed, a "conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Montgomery*, 136 S. Ct. at 730-31 (quoting *Ex parte Siebold*, 100 U.S. at 376) (internal quotation marks omitted). Put another way, "'an unconstitutional law is void, and is as no law,'" and any penalty imposed pursuant to that law "is, by definition, unlawful." *Id.* (quoting *Ex parte Siebold*, 100 U.S. at 376). Thus, the assertion that the underlying statute is unconstitutional most certainly would "stand in the way of conviction, [even] if factual guilt is validly established," *Menna*, 423 U.S. at 62 n.2, since the State has no lawful basis for convicting a defendant in the absence of a valid statute criminalizing his conduct.

Because Petitioner's due process and Second Amendment claims are challenges to the very power of the government to criminalize his conduct, he retained the right to pursue those challenges after pleading guilty. If Petitioner is correct that the Second Amendment precludes the government from enacting a law that criminalizes storage of lawfully-owned firearms in a locked vehicle in a publicly accessible parking lot approximately 1,000 feet from the entrance to the Capitol building, then Petitioner's conviction cannot stand. So too with respect to Petitioner's due process

notice challenge. For these reasons, Petitioner's guilty plea did not foreclose his right to appeal his conviction with a challenge to the constitutionality of § 5104.

3. That Petitioner's guilty plea did not implicitly waive his challenge to § 5104 is particularly clear because, at the time it decided *Blackledge* and *Menna*, this Court had already recognized that a defendant's challenge to the constitutionality of the statute of conviction survives a guilty plea. In *Haynes v. United States*, 390 U.S. 85 (1968), the defendant was a convicted felon charged with failing to register a firearm under the National Firearms Act, *id.* at 86-87. The defendant moved to dismiss the indictment, arguing that because he was a convicted felon and thus prohibited from owning a firearm, requiring him to register that firearm violated his Fifth Amendment right against self-incrimination. *Id.* at 86, 90. The court denied the motion to dismiss the indictment and the defendant thereafter pled guilty, admitting that he had indeed failed to register a firearm in violation of the law. *Id.* at 86-87. The defendant then appealed his conviction on the grounds that the registration requirement was unconstitutional both on its face and as applied to him. *Id.* at 87; *see also Haynes v. United States*, 372 F.2d 651, 652-54 (5th Cir. 1967), *judgment rev'd*, 390 U.S. 85 (1968). The Fifth Circuit reached the merits of his claims, noting that while a "guilty plea is a waiver of all nonjurisdictional defects and defenses and admits the facts charged, . . . [w]here, prior to his guilty plea, a defendant appropriately raises the unconstitutionality of the applicable statute, an appeal, directed to that

issue, is not foreclosed." *Haynes*, 372 F.2d at 652 (citing *Ex parte Siebold*, 100 U.S. 371).

After the Fifth Circuit upheld the defendant's conviction, this Court granted certiorari. Like the Fifth Circuit, this Court also reached the merits of defendant's claims, considering it quite obvious that "Petitioner's plea of guilty did not, of course, waive his previous claim of the constitutional privilege." *Haynes*, 390 U.S. at 87 n.2. While the Court did not further explain its rationale for this statement, it seems clear that the Court was animated by the same concerns in *Haynes* as it was in *Blackledge* and *Menna*—a guilty plea conceding factual guilt does not resolve questions about the government's very ability to bring the prosecution. Ultimately, this Court not only reached the merits of the defendant's claims in *Haynes*, it held the statute unconstitutional as applied to the defendant and reversed, finding it unnecessary to remand because "any proceeding in the District Court must inevitably result in the reversal of petitioner's conviction." *Id.* at 101. Like *Blackledge* and *Menna*, *Haynes* thus demonstrates that a guilty plea is not an automatic bar to a constitutional challenge to the statute of conviction.

4. Indeed, some of this Court's most historic rulings on constitutional rights arose from circumstances in which defendants pled guilty and later mounted constitutional challenges to their statutes of conviction. In *Loving v. Virginia*, 388 U.S. 1 (1967), for example, Richard and Mildred Loving pled guilty to violating Virginia's ban on interracial marriages. *Id.* at 3. After they were sentenced, the Lovings filed a motion to vacate the judgment against them and set aside their

sentences, "asserting that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid." *Loving v. Commonwealth*, 147 S.E.2d 78, 79 (Va. 1966), *judgment rev'd*, 388 U.S. 1 (1967). The government never argued that the Lovings' pleas foreclosed their constitutional challenge, and this Court certainly did not view their pleas as a bar, ultimately holding that because "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations . . . [t]hese convictions must be reversed." 388 U.S. at 12.

C. This Court's Retroactivity Jurisprudence Confirms That Constitutional Challenges To Criminal Statutes Raise Heightened Concerns.

In several other contexts discussed by Petitioner's amici, such as standing doctrine and pre-enforcement review of criminal statutes, this Court has recognized that challenges to the constitutionality of criminal statutes raise heightened concerns and warrant special solicitude. This is particularly true in the context of the Court's retroactivity jurisprudence. This parallel body of case law supports a holding that a guilty plea does not inherently waive a defendant's challenge to the constitutionality of the statute of conviction.

1. As early as *Ex parte Siebold*, 100 U.S. 371 (1879), this Court recognized that while a prisoner generally could not use the writ of habeas corpus to attack "a conviction and sentence by a court having jurisdiction of the cause," he *could* obtain relief in habeas if "the want of jurisdiction . . . or some other matter render[ed] [the

original court's] proceedings void." *Id.* at 375.[4] The Court then held that a challenge to the constitutionality of the statute of conviction fell within this narrow class of cases in which a court could afford habeas relief. As the Court explained, if the petitioners' argument was "well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Id.* at 376-77.

The Court's modern retroactivity jurisprudence recognizes the same principle. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," but are challenged in collateral proceedings. *Id.* at 310 (plurality opinion). The Court imposed two exceptions, however: "a new rule" applies retroactively on collateral review if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prosecute'"—what has become known as a

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[4] *Siebold* stated that "if the laws [of conviction] are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." *Id.* at 377. As discussed *infra*, however, the use of the term "jurisdiction" has not always been consistent, and the *Siebold* Court's invocation of that word is best understood as meaning that the government lacked authority to criminalize the defendants' actions—not that the court lacked jurisdiction in the modern sense of authority to decide the case. *See United States v. Williams*, 341 U.S. 58, 66 (1951).

"substantive rule"—or if it "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding"—what the Court termed a "watershed rule[] of criminal procedure." *Id.* at 311 (plurality opinion) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971)).

Subsequent cases have expanded on the distinction between substantive rules, which apply retroactively, and most procedural rules, which do not. Substantive rules "include[] decisions that narrow the scope of a constitutional statute by interpreting its terms, . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (citing *Bousley v. United States*, 523 U.S. 614, 20-21 (1998); *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); *Teague*, 489 U.S. at 311 (plurality opinion)). "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Id.* at 352 (quoting *Bousley*, 523 U.S. at 620). While the government might be able to proscribe the same conduct under a more aptly or narrowly drawn law going forward, the government cannot continue to hold the defendant under a statute that is not constitutionally drawn. *See, e.g., Welch v. United States*, 136 S. Ct. 1257, 1265-67 (2016).

By contrast, new rules of procedure generally do not apply retroactively. That is because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility

that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 1265 (quoting *Schriro*, 542 U.S. at 352) (quotation marks omitted). New procedural rules, in other words, do not impact the State's ability to prosecute the specific defendant for the conduct at issue, and they are generally surmountable by the government: even if the defendant shows that a different procedure should have been followed, the government normally would be free to re-try the defendant using those procedures, or to show that any error was harmless. For this reason, procedural rules have a "speculative connection to innocence." *Schriro*, 542 U.S. at 352. Unlike substantive rules, they do not necessarily undermine the determination that the defendant is guilty of the crime.

In this way, the Court's distinction between substantive rules, which always apply retroactively, and procedural rules, which usually do not, echoes the distinction between the *Blackledge/Menna* and *Tollet/Brady* lines of cases. Substantive rules apply retroactively because they go to the State's very power to validly prosecute the defendant, just as *Blackledge/Menna* claims survive a guilty plea because they too challenge the State's power to hold the defendant for the crime alleged. By contrast, procedural challenges generally do not apply retroactively, because, like *Tollett/Brady* claims, they raise concerns that go to the particular procedures used to obtain a conviction.

Concerns with the finality of a conviction are also parallel in the two contexts. In the retroactivity cases, this Court has explained that while the State often has a "weighty interest[] in ensuring the finality of convictions

and sentences," *Montgomery*, 136 S. Ct. at 732, where the conviction or sentence is not authorized by law, "finality interests are at their weakest," *Welch*, 136 S. Ct. at 1266. "As Justice Harlan wrote, '[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.'" *Id.* (quoting *Mackey*, 401 U.S., at 693 (opinion of Harlan, J.)); *see also Montgomery*, 136 S. Ct. at 732 (noting that *Teague*'s concerns with finality and expenditure of State's resources "has no application in the realm of substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose"). The same is true in the context of a challenge to the constitutionality of a statute following a guilty plea: because the State simply cannot convict someone of an act the law does not make criminal, the State lacks a viable interest in maintaining the finality of such a conviction on appeal.

Finality interests are stronger, however, for both *Tollett/Brady* claims and claims relying on the retroactive application of procedural rules. *See McMann*, 397 U.S. at 774 (explaining that permitting defendants to pursue claims of antecedent constitutional violation post-plea "would be an improvident invasion of the State's interests in maintaining the finality of guilty-plea convictions"); *Teague*, 489 U.S. at 309 (plurality opinion) ("Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system."). In those cases, "[i]f a new rule regulates only the procedures for

determining culpability . . . [t]he chance of a more accurate outcome under the new procedure normally does not justify the cost of vacating a conviction whose only flaw is that the procedures 'conformed to then-existing constitutional standards.'" *Welch*, 136 S. Ct. at 1266 (quoting *Teague*, 489 U.S. at 310 (plurality opinion)). Therefore, the "balance generally tips in favor of finality." *Id.*

In sum, this Court has recognized in the retroactivity context that challenges to the constitutionality of the statute of conviction are different in kind from challenges to the particular procedures followed to prove a defendant's factual guilt. The retroactivity case law thus supports holding that a defendant who pleads guilty may nonetheless raise a challenge to the constitutionality of the underlying statute on appeal, just as a habeas petitioner may benefit in post-conviction proceedings from the invalidation of an unconstitutional statute after his own conviction has become final.

2. To hold otherwise would make little sense. In its Brief in Opposition, the government argued that if this Court were to conclude that a defendant who pleads guilty is inherently precluded from challenging on direct appeal the constitutionality of the statute of conviction, he could nonetheless "seek[] the benefit of a substantive ruling establishing that the statute of conviction is unconstitutional [by] seek[ing] relief under 28 U.S.C. 2255." BIO 18. However, as Petitioner noted in reply, the government likely would contend at that point that the defendant had forfeited the claim by failing to raise it on direct review. *See* Pet. Reply 6 n.4 (citing *Massaro v. United States*, 538 U.S. 500, 504 (2003)). That would

place the defendant in an impermissible Catch-22: on direct appeal, the government would argue that the constitutional claims can be raised only in habeas—and then in habeas, the government would take the position that the claims were procedurally improper for having not been raised on direct review.

Moreover, even if a defendant who is barred from raising a claim on direct appeal were able to do so on collateral review, that rule would result in a substantial waste of resources. It would require courts to address claims on collateral review that easily could have been resolved on direct appeal. It also would force defendants who have been prosecuted under unconstitutional statutes to further languish in the criminal justice system while they await relief in habeas. And it would leave unconstitutional statutes on the books for longer, chilling protected conduct. Such a result would extract great cost from defendants and the judicial system alike with little or no corresponding benefit.

II. Rule 11(a)(2) Does Not Require That A Constitutional Challenge To The Statute Of Conviction—Facial Or As-Applied—Be Expressly Preserved In A Plea Agreement.

The court below got the default rules wrong. Without even mentioning this Court's decisions in *Blackledge* and *Menna*, the D.C. Circuit erroneously held that it could not entertain Petitioner's constitutional challenges to the statute under which he was convicted. The court rested its decision on the fact that Petitioner did not enter a conditional plea pursuant to Federal Rule of Criminal Procedure 11(a)(2), which provides that "[w]ith the consent of the court and the

government, a defendant may enter a conditional plea of guilty . . . , reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." *See* Pet. App. 4a. The D.C. Circuit held that in the absence of a conditional plea entered under Rule 11(a)(2), all claims of error are waived by a guilty plea, and that there were only "two recognized exceptions to this rule": "the defendant's claimed right not to be haled into court at all" and a claim that the court lacked subject-matter jurisdiction over the case. Pet. App. 4a (quoting *Delgado-Garcia*, 374 F.3d at 1341). The court then found that neither "exception" applied in this case.

By not engaging with *Blackledge* and *Menna* or Petitioner's arguments, the D.C. Circuit failed to appreciate that Rule 11(a)(2) has no application to this case. As explained by the Advisory Committee that drafted it, Rule 11(a)(2) applies only when *Blackledge* and *Menna* do not. For the reasons set forth in Part I, Petitioner's Second Amendment and due process challenges fall squarely within the *Blackledge/Menna* doctrine, and therefore he did not need to expressly reserve those claims in writing or obtain the government's or the court's permission to preserve those claims for appeal. Nor does it matter, as some lower courts and the government have suggested, whether those claims are considered "jurisdictional," or whether they are presented as facial or as-applied challenges.

1. Like the D.C. Circuit, the government has relied on Federal Rule of Criminal Procedure 11(a)(2) to support the argument that a defendant who pleads

guilty inherently waives his right to challenge the statute of conviction on appeal. BIO 7-8. Yet the Rule in fact favors Petitioner's view, because it reiterates the distinction between *Tollett/Brady* claims, to which the Rule applies, and *Blackledge/Menna* claims, to which it does not.

Adopted in 1983, Rule 11(a)(2) was enacted to resolve a circuit split on the permissibility of conditional pleas that reserve a defendant's right to "have an appellate court review an adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2); *see also* Fed. R. Crim. P. 11 advisory committee's note to 1983 amendments. Rule 11(a)(2) sanctioned the practice, but it imposed two conditions on defendants who wished to take advantage of the new rule. First, defendants were required to "reserv[e] in writing" those claims that they wished to preserve. Second, they had to obtain "the consent of the court and the government." Fed. R. Crim. P. 11(a)(2).

Importantly, the Advisory Committee explained that Rule 11(a)(2)'s new requirements did not apply to *all* pretrial motions—specifically, the requirements did not apply to pretrial motions raising *Blackledge/Menna* claims about the very power of the State to prosecute the defendant. As the Advisory Committee explicitly noted: "The Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty. . . . *Subdivision 11(a)(2) has no application to such situations*, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application." Fed. R. Crim. P. 11 advisory committee's

note to 1983 amendments (emphasis added). Thus, the Advisory Committee clarified that where a constitutional objection falls into the *Blackledge/Menna* category, there is no need for a defendant to reserve in writing his right to bring the constitutional objection, or to obtain the permission of the court or the government to appeal.

Such a qualification is eminently reasonable given the nature of claims under *Blackledge* and *Menna*. It would make little sense to require the defendant to obtain the permission of the prosecutor to preserve a challenge to the very power of the prosecutor over the defendant. Such a requirement would leave defendants "at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Considering the vast leverage that prosecutors wield in plea negotiations, *see, e.g.*, Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 109-12 (2005), establishing a default rule that would require defendants to affirmatively preserve a constitutional challenge to the statute of conviction would not only render the Advisory Committee's notes about *Blackledge* and *Menna* meaningless, it would render the very doctrine of *Blackledge* and *Menna* meaningless.

2. Although the Advisory Committee was explicit about the inapplicability of Rule 11(a)(2)'s requirements to *Blackledge/Menna* claims, the Committee unhelpfully couched its broader discussion of Rule 11(a)(2) in terms of "jurisdiction." In discussing Rule 11(a)(2) generally, the Advisory Committee noted that "the availability of a conditional plea under specified circumstances will aid

in clarifying the fact that traditional, unqualified pleas do constitute a waiver of *nonjurisdictional* defects." Fed. R. Crim. P. 11 advisory committee's note to 1983 amendments (emphasis added). Many lower courts have also used this language, holding that only challenges to a court's "jurisdiction" survive a guilty plea, and pointing to *Blackledge* and *Menna* as examples of such "jurisdictional" challenges. *See, e.g., United States v. Phillips*, 645 F.3d 859, 862 (7th Cir. 2011); *United States v. Andrade*, 83 F.3d 729, 731 (5th Cir. 1996) ("A plea of guilty typically waives all non-jurisdictional defects in the proceedings below"). By using the terms "jurisdictional" and "nonjurisdictional" in a "less than meticulous" manner, *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004), the Advisory Committee and the lower courts have generated significant confusion.

The Advisory Committee's note does not mean that the class of rights protected by *Blackledge* and *Menna* implicates a court's jurisdiction in the formal sense of subject-matter or personal jurisdiction. *See Kontrick*, 540 U.S. at 454. Rather, the Advisory Committee and those courts that have properly understood the scope of *Blackledge* and *Menna* have used the term "jurisdiction" as shorthand for the idea that the government has no power to criminalize the conduct at issue.[5] The Seventh

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[5] The D.C. Circuit appears to have understood that *Blackledge/Menna* claims are not themselves "jurisdictional," because it conceptualized the "exception" for "jurisdictional" claims as distinct from the "exception" for claims that raise the defendant's right "not to be haled into court at all," like those in *Blackledge* and *Menna*. *See* Pet. App. 4a (discussing *Delgado-Garcia*, 374 F.3d at

Circuit has acknowledged as much with respect to its own use of the term in the guilty plea context, noting that "'jurisdictional' . . . does not refer to subject matter jurisdiction." *Phillips*, 645 F.3d at 862. Instead, "[a] jurisdictional issue is one that stands in the way of conviction—even when factual guilt is validly established—and prevents a court from entering any judgment in the case." *Id.* (citing *Blackledge*, 417 U.S. at 30). Other courts have similarly explained their use of the words "jurisdictional" and "nonjurisdictional" in this context. *See, e.g., United States v. DeVaughn*, 694 F.3d 1141, 1152-53 (10th Cir. 2012) (acknowledging that the court's previous statement that guilty pleas waive all "nonjurisdictional defects" is a misnomer in light of *Blackledge* and *Menna*); *United States v. Johnston*, 199 F.3d 1015, 1019 n.3 (9th Cir. 1999) ("jurisdictional" defects in the context of a guilty plea include "claims in which . . . the charge in question is one which the state may not constitutionally prosecute").

Blackledge and *Menna* themselves make clear that they are not limited to claims that are formally "jurisdictional" in nature—*i.e.*, those "prescriptions delineating the class of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455. After all, the due process and double jeopardy challenges in those cases would not meet that test: they are not jurisdictional in the sense that, if valid, they would demonstrate that the court

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1341). As discussed *infra*, however, the D.C. Circuit interpreted the "haled into court" language in an unduly narrow fashion.

lacks "adjudicatory authority" over the case. *See id.*; *DeVaughn*, 694 F.3d at 1153-54; *Phillips*, 645 F.3d at 862-63; *United States v. Baucum*, 80 F.3d 539, 542-43 (D.C. Cir. 1996).

3. Similarly misguided was the D.C. Circuit's holding that Petitioner's claims were foreclosed because they did not involve the "right not to be haled into court at all." Pet. App. 4a (quotation marks omitted). Although it did not mention *Blackledge*, the court was presumably referencing *Blackledge*'s statement that the due process right asserted in that case was "the right not to be haled into court at all upon the felony charge." 417 U.S. at 30. The D.C. Circuit offered an extraordinarily narrow view of that statement, apparently holding that Petitioner forfeited his constitutional claims by appearing in court to answer the charges against him. That is, of course, not what *Blackledge* held. Rather, as explained above, *Blackledge* was about the power of the State to obtain a valid conviction. *See id.* at 30-31; *Menna*, 423 U.S. at 62 & n.2.

Again, *Blackledge* and *Menna* themselves make clear that the "haled into court" language does not literally limit the types of challenges that may be raised following a guilty plea to those in which a defendant never has to appear in court to answer the charges against him. In both *Blackledge* and *Menna*, the defendants were in fact "haled into court" and required to litigate their constitutional challenges following their guilty pleas from the trial courts through the courts of appeals and to the Supreme Court. 417 U.S. at 30; 423 U.S. at 61-62. As explained above, the correct inquiry under *Blackledge* and *Menna* is not about being

physically "haled into court." Rather, it is about whether the defendant's claim, if successful, would forever prevent a valid prosecution or trial from taking place. Petitioner's constitutional challenges meet this test, and he should have been permitted to pursue them on appeal without expressly reserving them pursuant to Rule 11(a)(2).

4. Although the D.C. Circuit did not reach the issue, some other courts of appeals have further confused the scope of *Blackledge* and *Menna* by holding that guilty pleas inherently waive as-applied, but not facial, constitutional challenges to the statute of conviction. *See United States v. Aranda*, 612 F. App'x 177, 178 n.1 (4th Cir. 2015); *Phillips*, 645 F.3d at 863; *United States v. Seay*, 620 F.3d 919, 922-23 (8th Cir. 2010). This distinction makes little sense and contravenes this Court's own precedent. Where the claim is that the State is without power to prosecute, it does not matter whether the challenge is facial or as applied.

Blackledge and *Menna* themselves involved as-applied challenges. In *Blackledge*, the claim was that the State was, "*under the facts of this case*, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court." 417 U.S. at 30 (emphasis added). Likewise, in *Menna*, the defendant's claim was that *because of the particular facts of that case*, the "Double Jeopardy Clause precluded the State from haling him into court on the charge to which he had pleaded guilty." 423 U.S. at 62. Similarly, in *Haynes*, this Court reversed the petitioner's conviction following a guilty plea even though it agreed with the government that a *facial*

challenge to the statute at issue was "inappropriate." 390 U.S. at 99.

To the extent the *Blackledge/Menna* category is limited to "facial" claims, it is limited only by the concept of "facial" set forth in *Broce*, in which the Court declined to entertain defendants' claim of double jeopardy because the defendants could not "prove their claim by relying on those indictments and the existing record" at the time of the plea. 488 U.S. at 576. Thus, *Broce* held that the *Blackledge/Menna* claim must be apparent "on the face" of the record as it exists at the time of the plea. *Id.* at 569 (majority opinion); *id.* at 583 (Blackmun, J., dissenting). *Broce*'s holding that defendants cannot rely on later-established facts should not be misconstrued as a categorical prohibition of as-applied claims.

It would be odd indeed to allow a defendant to bring facial but not as-applied constitutional challenges post-plea, given that facial challenges are generally "disfavored" by the Court. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Facial challenges can "run contrary to the fundamental principle of judicial restraint" because they often ask the court to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (internal quotation marks omitted); *see also Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (noting that the "distinction between facial and as-applied challenges is not so well defined that it has some automatic effect"). There is no reason to hold that a defendant must seek to invalidate a statute in all instances in order to argue that the statute cannot make him a criminal in a particular circumstance. This Court

should clarify that Petitioner is permitted to bring both his facial and as-applied challenges on appeal.

III. In The Alternative, The Court Should Remand For A Determination Of Whether Petitioner's Plea Was Voluntary, Knowing, And Intelligent.

For all of the reasons discussed above, this Court should hold that a guilty plea does not inherently waive the defendant's right to challenge the constitutionality of the statute of conviction. Nonetheless, if this Court disagrees and establishes a new default rule requiring defendants to expressly preserve such rights in their plea agreements pursuant to Rule 11(a)(2), the Court should remand for the lower courts to determine whether Petitioner's plea was voluntary, knowing, and intelligent—an issue that Petitioner raised below, but that the Court of Appeals failed to address.

This Court has long held that a guilty plea "is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Brady*, 397 U.S. at 748); *see also, e.g., Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976). If the Court concludes that despite the lack of any express waiver in his plea agreement, Petitioner's guilty plea nonetheless waived his right to directly appeal the constitutionality of the statute of conviction, serious questions remain regarding whether the plea was voluntary, knowing, and intelligent. *See Tollett*, 411 U.S. at 267 (reaffirming principle that even where a guilty plea eliminates the right to raise a challenge based on a preceding constitutional violation, the defendant

remains free to "attack the voluntary and intelligent character of the guilty plea").

Although Petitioner consulted "off and on" with stand-by counsel, he was *pro se* when he pled guilty. J.A. 53. Yet rather than receive a clear explanation of the consequences of his plea from the district court, he was informed that he could "appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." JA. 63. Thereafter, when the court asked Petitioner if he "want[ed] to give up most of [his] rights to an appeal," Petitioner responded that he was willing to give up those rights "[o]ther than what [the court] mentioned." J.A. 66. The court did not seek to establish what Petitioner meant by this statement or whether Petitioner understood what the court meant when it informed Petitioner that he could "appeal [his] conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." J.A. 63, 66; *cf. United States v. Warwar*, 478 F.2d 1183, 1184-85 (1st Cir. 1973) ("[W]hen it affirmatively appears that the defendant may be under a misapprehension as to the effect of a guilty plea upon the preservation of any of his rights, it becomes the duty of the court to take appropriate corrective action. In the present case, the court should have informed the appellant that, by pleading guilty, he might be waiving a claim which he apparently intended to preserve . . . .").

The court's statement, coupled with the plea agreement's omission of an express waiver of the right to appeal his conviction among the express listing of other waived rights, strongly corroborates Petitioner's assertion that he did not make a voluntary, knowing, and

intelligent decision to waive his right to appeal. That Petitioner did not understand the scope of his plea's appellate waiver to include a challenge to the constitutionality of his statute of conviction is particularly clear considering Petitioner's course of conduct in filing a notice of appeal four days after he was sentenced. *See* D.C. Cir. J.A. 24-25.

Although Petitioner challenged below the voluntary, knowing, and intelligent nature of his plea, the D.C. Circuit never addressed the issue. It did not find the argument waived or lacking on the merits; it simply did not discuss it at all. In these circumstances, if this Court holds that Petitioner's plea waived his right to challenge the constitutionality of the statute of conviction on appeal, it should nonetheless remand for a determination as to whether the plea was voluntary, knowing, and intelligent. *See, e.g., Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 697 n.28 (2010) ("When the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration . . . ."); *Bousley v. United States*, 523 U.S. 614, 623 (1998) (remanding for consideration of actual innocence claim not addressed by lower courts).

CONCLUSION

The judgment of the District of Columbia Circuit should be reversed.

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RECORD AND BRIEFS

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In the Supreme Court of the United States

RODNEY CLASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner is entitled to challenge the constitutionality of his statute of conviction on appeal, notwithstanding his entry of an unconditional guilty plea in which he did not seek to preserve any right to pursue such a challenge.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter. The district court's oral order denying petitioner's motion to dismiss the indictment (Pet. App. 6a-9a) is unreported. The district court's opinion and order deferring in part and denying in part petitioner's motion to dismiss the indictment (Pet. App. 10a-16a) is reported at 38 F. Supp. 3d 19.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2016. The petition for a writ of certiorari was filed on September 30, 2016, and the petition was granted on February 21, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 11(a)(2) provides:

> *Conditional plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

STATEMENT

Following a guilty plea in the United States District Court for the District of Columbia, petitioner was convicted on one count of unlawfully carrying and having readily accessible a firearm on Capitol Grounds, in violation of 40 U.S.C. 5104(e)(1). C.A. App. 165. He was sentenced to 24 days of imprisonment, to be followed by 12 months of supervised release. *Id.* at 166-167. The court of appeals affirmed. Pet. App. 1a-5a.

1. Shortly before noon on a weekday, petitioner parked his Jeep in a permit-only parking lot on "the 200 block of Maryland Avenue, SW, Washington, D.C., which is part of the Capitol Grounds." J.A. 24; see Gov't C.A. Br. 5. That parking lot, which petitioner chose for its proximity to congressional office buildings, is reserved for employees of the House of Representatives. Gov't C.A. Br. 5. The parking lot had signs warning that it was open only to permit-holders, and street barriers, a guard station, and other indicators of restricted access were visible. *Ibid.*; see Pet. Br. 6.

After parking there, petitioner walked to the Capitol and to the House and Senate office buildings in order to have paperwork appointing him a "Private Attorney General" stamped at the offices of various committees

and Members of Congress. Gov't C.A. Br. 5. While petitioner was inside, an agent of the United States Capitol Police noticed that his Jeep was parked in the employees-only lot without a permit. *Id.* at 6. Through the Jeep's side windows, the agent saw what appeared to be a large blade and a gun holster. *Ibid.*; J.A. 24. She called for backup. Gov't C.A. Br. 6. She also ran a background check on the Jeep, discovering that it was registered to petitioner. *Ibid.*

About two hours after he had arrived, petitioner emerged from the Capitol and returned to the restricted lot. Gov't C.A. Br. 6. When the Capitol Police intercepted him, he admitted that he was the owner of the Jeep and that the Jeep contained weapons. *Ibid.* After he withdrew his initial consent for a search of the Jeep, the officers obtained a search warrant. *Id.* at 6-7. The search uncovered, *inter alia*, a 9mm Ruger pistol loaded with eight rounds, including one round in the chamber; several loaded magazines containing 35 additional 9mm rounds; a box of 50 additional 9mm rounds; a .44 caliber Taurus pistol loaded with seven rounds, including one round in the chamber; an additional 90 rounds of .44 caliber ammunition; a .44 caliber Henry rifle loaded with 11 rounds, including one round in the chamber; and an additional 55 rounds of .44 caliber ammunition. J.A. 25; C.A. App. 70 n.1. All of the guns and ammunition were stored in unlocked bags in either the passenger area or between that area and the rear of the Jeep. J.A. 25.

Petitioner was later questioned by the FBI at Capitol Police headquarters. Gov't C.A. Br. 7. He said that he was a "Constitutional Bounty Hunter" and a "Private Attorney General" who traveled the nation with guns and other weapons to enforce federal criminal law

against judges whom he believed had acted unlawfully. *Ibid.* He explained that he had come to the Capitol and the House and Senate Office Buildings to have a "Commission by Declaration" signed. *Ibid.* He also told the agents that he was planning to take his weapons with him to bring charges against a federal judge in Pennsylvania, although he disclaimed any intention to use the weapons against the judge. *Ibid.*

2. A grand jury indicted petitioner on one count of unlawfully carrying or having readily accessible firearms on the Capitol Grounds, in violation of 40 U.S.C. 5104(e)(1), and one count of carrying a pistol in public, in violation of D.C. Code § 22-4504(a) (LexisNexis 2001). J.A. 20-21. The latter charge was ultimately dismissed after the United States District Court for the District of Columbia, in another case, held the D.C. Code provision unconstitutional. C.A. App. 122-123; C.A. Supp. App. 134; see *Palmer* v. *District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

Petitioner eventually waived his right to counsel and was appointed standby counsel. J.A. 2-3. Petitioner filed a number of pro se motions seeking, *inter alia*, dismissal of his case. Pet. App. 11a-16a. He included assertions about the Second Amendment. C.A. App. 32-33; see *id.* at 36, 42-43, 46. Petitioner also faulted the government for not posting signs that would have informed him of the unlawfulness of his conduct, but he did not directly argue that Section 5104(e)(1) was unconstitutionally vague, nor did the government perceive him to be raising such an argument. See *id.* at 39, 65, 128; see *id.* at 124, 130, 138; see also Gov't C.A. Br. 29-31. The district court denied most of petitioner's motions, likewise without perceiving him to have raised a due process vagueness claim. C.A. App. 70-100. The

court did, however, order a substantive response from the government "to the extent [petitioner] challenges his prosecution under the Second Amendment" and on certain other issues. Pet. App. 16a; see C.A. App. 70-100.

At a subsequent motions hearing, the district court "generously" construed petitioner's minimal "assertions" that the D.C. city ordinance included in his original indictment "'is unconstitutional'" as a Second Amendment challenge to the federal charge of carrying a firearm on Capitol Grounds, in violation of 40 U.S.C. 5104(e)(1). Pet. App. 9a; see *id.* at 7a. The court rejected that challenge. *Id.* at 8a. The court observed that this Court's decision in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), which had held a different D.C. ordinance unconstitutional, had been "careful in emphasizing that nothing in [that] opinion should be taken to cast doubt on longstanding laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" and had "stressed that such laws are presumptively lawful, regulatory measures." Pet. App. 8a.

3. Petitioner's case was originally scheduled for a trial, but petitioner (who had been released on bond) failed to appear for it, notifying the district court by letter that he would no longer participate in the proceedings. Gov't C.A. Br. 4. Petitioner was arrested on a bench warrant and reindicted on one count of violating Section 5104(e)(1). *Ibid.* He subsequently entered an unconditional guilty plea, pursuant to a plea agreement, to that count. Pet. App. 2a; J.A. 29-47.

a. The plea agreement provided that in consideration for petitioner's guilty plea, the government agreed, *inter alia*, not to prosecute petitioner for his "failure

to appear for trial * * * in violation of 18 U.S.C. § 3146(a)(1)." J.A. 31. The government also agreed to seek a sentence at the low end of the estimated Sentencing Guidelines range, which was zero to six months of imprisonment and a $500 to $5000 fine. J.A. 33-35.

The plea agreement included a "Waivers" section that informed petitioner that his guilty plea constituted an "agree[ment] to waive certain rights afforded by the Constitution of the United States and/or by statute or rule." J.A. 38-39. The section describing the various "Trial Rights" that petitioner waived included "the right to appeal [a] conviction" had he been "found guilty after a trial." J.A. 39-40. The section describing petitioner's waiver of "Appeal Rights" included a specific "waive[r]" of "the right to appeal the sentence in this case * * * except to the extent" that the district court imposed a sentence "above the statutory maximum or guidelines range" that the court determined to be applicable. J.A. 40-41.

b. The district court held a plea hearing, at which it "conducted a full inquiry pursuant to Federal Rule of Criminal Procedure 11." Pet. App. 2a; see J.A. 48-94. Petitioner pleaded guilty unconditionally, without invoking the procedures of Rule 11(a)(2), whereby "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2).

The district court explained to petitioner that by entering his plea, he "would be generally giving up [his] rights to appeal." J.A. 63. Petitioner indicated that he understood. *Ibid.* The court then described "excep-

tions" to that general rule: for an appeal of his conviction "if [he] believe[d] that [his] guilty plea was somehow unlawful or involuntary or if there [were] some other fundamental defect in the[] guilty-plea proceedings," and for an appeal of his sentence "if [he] th[ought] the sentence [was] illegal." *Ibid.* Asked if he understood, petitioner responded, "Yeah. Pretty much." *Ibid.*

The district court then added, "[n]ow, if you plead guilty in this case and I accept your guilty plea, you'll give up all of the rights I just explained to you, aside from the exceptions that I mentioned, because there will not be any trial, and there will probably be no appeal." J.A. 64. The court informed petitioner that he "may also have a right to appeal [his] sentence if it exceeds the Sentencing Guideline Range" and that he "could also challenge [his] conviction or sentence based on newly discovered evidence or a claim of ineffective assistance of counsel." *Ibid.* Petitioner indicated that he understood. *Ibid.*

After confirming that petitioner was willing to "give up" his trial rights, the district court had the following exchange with petitioner:

> THE COURT: Do you want to give up most of your rights to an appeal as well?
>
> [PETITIONER]: Other than what you mentioned, yes.
>
> THE COURT: Aside from those exceptions.

J.A. 66.

Later in the colloquy, the district court discussed with petitioner the appeal-waiver provisions of his plea agreement. J.A. 76. The court told petitioner that "under this plea agreement, you are giving up your right to

appeal your conviction and challenge the sentence I impose, unless the sentence exceeds the statutory maximum of the Guidelines Range or you claim newly discovered evidence or ineffective assistance of counsel." *Ibid.* Asked if he understood, petitioner responded, "Yes." J.A. 76-77.

The district court accepted the plea, finding that petitioner "was competent and capable of making a decision, that he understood the nature and consequences of what he was doing, that he entered his plea knowingly and voluntarily and of his own free will, and that there was a factual basis for his entering a plea of guilty." J.A. 96. The court sentenced petitioner to time served (24 days of imprisonment), to be followed by 12 months of supervised release, and a $250 fine. J.A. 11.

4. Petitioner appealed his conviction and filed a pro se opening brief, asserting factual, procedural, and substantive errors in the district-court proceedings. Pet. C.A. Br. 12-32. He relied on, *inter alia*, the Second Amendment. See *id.* at 12-13, 23-26.

a. The court of appeals appointed an amicus, whose arguments petitioner adopted. See Pet. 9 & n.4. The amicus brief argued that the federal statute under which petitioner had been convicted, 40 U.S.C. 5104(e), "violates the Second Amendment, as applied to a law-abiding adult citizen's right to keep legally-owned firearms in his vehicle parked in an unsecured, publicly-accessible parking lot" on the Capitol Grounds. C.A. Amicus Br. 1. It also argued that the statute was "unconstitutionally vague" because it is "exceedingly difficult for someone to determine that the Maryland Avenue parking lot is part of the Capitol Grounds" and the statute does not require proof of scienter. *Id.* at 4, 51.

The government's brief contended, *inter alia*, that petitioner's unconditional guilty plea, which had not invoked the conditional-plea procedures prescribed by Federal Rule of Criminal Procedure 11(a)(2), precluded him from raising those arguments on appeal. Gov't C.A. Br. 21-29. The government also observed that "[n]either Appellant nor Amicus argues that, under the Second Amendment, the firearms provision of the Capitol Grounds security statute is facially unconstitutional," *id.* at 26 n.14, and contended that the vagueness argument had been forfeited by petitioner's failure to raise it in district court, *id.* at 29-31.

b. The court of appeals affirmed. Pet. App. 1a-5a. The court perceived petitioner to be "assert[ing] three grounds of constitutional error and a further claim of statutory error," but held that "[n]one of them" was "properly before" the court on appeal. *Id.* at 3a.

The court of appeals observed that "[a]lthough the Federal Rules of Criminal Procedure provide for conditional pleas wherein a pleading defendant may 'reserve in writing the right to have an appellate court review an adverse determination of a specified pretrial motion,'" Pet. App. 3a-4a (brackets omitted) (quoting Fed. R. Crim. P. 11(a)(2)), petitioner's "plea in the present case contains no such reservation," *id.* at 4a. The court cited "well-established law that 'unconditional guilty pleas that are knowing and intelligent waive the pleading defendant's claims of error on appeal, even constitutional claims.'" *Id.* at 3a (brackets and ellipsis omitted) (quoting *United States* v. *Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004), cert. denied, 544 U.S. 950 (2005)). And it determined that neither of the "two recognized exceptions to this rule"—namely, "'the defendant's claimed right not to be haled into court at all,' and a

claim 'that the court below lacked subject-matter jurisdiction over the case'"—"applies here." *Id.* at 4a (quoting *Delgado-Garcia*, 374 F.3d at 1341).

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioner was not entitled to consent unconditionally to his conviction in district court, then attack the statute underlying his conviction on appeal. Petitioner had ample ways to preserve and present his constitutional claims. But he availed himself of none of them. Instead, petitioner relinquished his current claims by his failure to follow the conditional-plea procedure in Federal Rule of Criminal Procedure 11(a)(2). Raising those claims on appeal is also inconsistent with his admission of legal guilt and unconditional consent to entry of a judgment of conviction. And he additionally waived the right to appeal on those claims during his plea colloquy. Contrary to petitioner's contention, neither *Blackledge* v. *Perry*, 417 U.S. 21 (1974), which involved a prosecutorial-vindictiveness claim, nor *Menna* v. *New York*, 423 U.S. 61, 62 (1975) (per curiam), which involved a double-jeopardy claim, allows a defendant automatically to challenge his statute of conviction on appeal, irrespective of any forfeiture, admission, or waiver. The judgment should be affirmed.

A. As petitioner appears to acknowledge (Br. 30 n.4), a constitutional challenge to the statute underlying a criminal charge is not jurisdictional, does not implicate the power of the court to hear the case, and can be forfeited, waived, or otherwise precluded. See *United States* v. *Williams*, 341 U.S. 58, 66-69 (1951); Pet. Br. 30 n.4. Courts regularly decline to entertain such challenges, or review them only for plain error, when they have not been preserved. Petitioner's argument that

such claims deserve special exemption from normal waiver principles relies on retroactivity doctrines that are inapplicable here. If petitioner were attacking his conviction based on a recent binding judicial decision definitively establishing a new retroactive constitutional rule, he might well be entitled to relief. Although a defendant can forfeit, waive, or relinquish his right personally to pursue a legally uncertain claim—and does so by pleading guilty—a guilty plea does not implicitly or explicitly acquiesce in a punishment that has clearly been shown to lack any tenable legal basis. But a defendant seeking to substantively invalidate his conviction in the first instance on appeal, without having reserved the right to do so, cannot evade standard forfeiture, waiver, and relinquishment doctrines that preclude such appeals.

B. The exclusive procedure for preserving a constitutional challenge to a federal criminal statute to which a defendant pleads guilty is the conditional-plea procedure set forth in Federal Rule of Criminal Procedure 11(a)(2). Under that Rule, "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2). The Rule enhances the finality of guilty pleas by "clarifying the fact that traditional, unqualified pleas do constitute a waiver of nonjurisdictional defects," Fed. R. Crim. P. 11 advisory committee's note (1983), like the defects petitioner asserts here. Neither the text of the Rule nor the Advisory Committee Notes contains any exception for appellate claims challenging the constitutionality of the statute of conviction. The Advisory Notes instead make clear that

the Rule is designed to preclude, as broadly as possible, a defendant from silently reserving issues for appeal without first notifying the court and the government of the respects in which he views his guilty plea to be inconclusive. The courts and the government agree in many cases to conditional pleas that preserve constitutional claims, including claims that the charging statute is unconstitutional. Petitioner was not entitled to bypass that procedure while obtaining its benefits.

C. Even aside from Rule 11(a)(2), a defendant's unconditional consent to entry of a judgment of conviction is inherently incompatible with the implicit reservation of a claim that relies on unestablished law to contest his guilt. "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *United States* v. *Broce*, 488 U.S. 563, 569 (1989). In the absence of a new substantive constitutional rule, a defendant may not renounce the fundamental premise of his plea—his consent to the entry of legal judgment against him—by attacking the statute on which the judgment is premised. A defendant who voluntarily pleads guilty has made a strategic choice in which he accepts an adverse legal judgment in return for sentencing considerations and other potential benefits. So long as his plea knowingly and intelligently acquiesces to his conviction—which does not require his subjective awareness of potential defenses that the plea forecloses—it precludes an appellate attack on the presumptively lawful basis for that conviction.

Because a challenge to the statute of conviction is an attack on the conviction, rather than on the initiation of the proceedings through which the plea was obtained, it

is different in kind from the types of claims that this Court identified in *Blackledge* and *Menna* as exceptions to the general preclusive effect of a guilty plea. The prosecutorial-vindictiveness and double-jeopardy claims in those cases contended that the prosecution was "precluded * * * from haling a defendant into court on a charge." *Menna*, 423 U.S. at 62; see *Blackledge*, 417 U.S. 21. They thus challenged the act of commencing the prosecution and thereby forcing the defendant to enter a plea—an act to which the ensuing plea cannot be deemed to consent. Here, in contrast, the act of bringing a prosecution under a presumptively valid statute is not itself subject to attack. An appellate challenge to the statute's constitutionality contests not the filing of the charge but the conviction—the very thing to which the defendant acquiesced by pleading guilty.

D. The particular guilty plea in this case precludes petitioner's appeal for the additional reason that it was entered following multiple judicial warnings about its preclusive effect. The district court explained, and petitioner said he understood, that an appeal following the plea would generally be barred. None of the exceptions the court listed can fairly be construed to cover the claims that petitioner now raises. Petitioner's suggestion that his plea was not knowing and intelligent because he was unaware of its preclusive effect is outside the question presented, factually incorrect, and legally meritless. Even assuming petitioner did not fully comprehend the district court's explanation of the plea's preclusive scope, such perfect understanding is not required for the plea to be valid.

ARGUMENT

PETITIONER'S APPELLATE CHALLENGE TO HIS STATUTE OF CONVICTION IS FORECLOSED BY HIS UNCONDITIONAL GUILTY PLEA

A federal defendant who wishes to raise a constitutional challenge to the substantive criminal statute underlying his prosecution has multiple potential avenues for doing so. As an initial matter, he can bring the challenge in a pretrial motion to dismiss the indictment. Fed. R. Crim. P. 12(b)(1). If that motion is unsuccessful, he can preserve his claim for appeal by going to trial (where he can raise the claim again by moving for acquittal, see Fed. R. Crim. P. 29(a) and (c)); by offering to stipulate the facts necessary to prove guilt while maintaining his constitutional claim to legal innocence, see *Lefkowitz* v. *Newsome*, 420 U.S. 283, 290 n.7 (1975); or by seeking to enter a conditional plea in which his acceptance of legal guilt is qualified by his continued reservation of his constitutional claim, see Fed. R. Crim. P. 11(a)(2). A defendant can also later seek the benefit of a judicial decision that retroactively validates his claim and vitiates the government's authority to continue to punish him. See 28 U.S.C. 2255; see also, *e.g.*, *Welch* v. *United States*, 136 S. Ct. 1257, 1264-1265 (2016); *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 732 (2016).

What a defendant cannot do is unqualifiedly consent to conviction by entering an unconditional plea of guilty, then turn around and attack that conviction on appeal by challenging the presumptive validity of the statute underlying it. The many systemic benefits of guilty pleas—prompt resolution of criminal charges, conservation of judicial and prosecutorial resources, and the potential for more favorable sentencing terms—"can be

secured * * * only if dispositions by guilty plea are accorded a great measure of finality." *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). Permitting petitioner here to challenge his conviction on appeal on grounds that he did not reserve in a conditional plea under Federal Rule of Criminal Procedure 11(a)(2), that are inconsistent with his admission of legal guilt, and that he expressly waived his right to raise during the plea colloquy would undermine both the finality of guilty pleas and the orderly procedures developed to ensure it.

Petitioner errs in relying on the Court's treatment of the prosecutorial-vindictiveness and double-jeopardy claims in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61, 62 (1975) (per curiam), to argue that an appellate challenge to a statute of conviction automatically survives all plea-related relinquishment and need not be preserved. Neither *Blackledge* nor *Menna* identifies such a challenge as jurisdictional, or otherwise immune to relinquishment. The drafters of Rule 11(a)(2) accordingly did not view such challenges to be outside the scope of the Rule's mandatory preservation procedures, even though they thought that the specific claims in *Blackledge* and *Menna* were. Furthermore, the exception that *Blackledge* and *Menna* recognize to the inherent preclusive effect of a guilty plea does not encompass challenges to the statute of conviction, which attack the very legal guilt that the defendant has admitted, rather than the act of filing the charges that required the defendant to appear in court and enter a plea. And nothing in *Blackledge* and *Menna* forecloses the possibility of an express waiver of appellate claims.

A. A Challenge To The Constitutionality Of A Substantive Criminal Statute Is A Nonjurisdictional Claim That Can Be Forfeited Or Waived

As petitioner appears to acknowledge (Br. 30 n.4), a claim that a criminal statute is unconstitutional, either on its face or as applied, does not present an issue of "jurisdiction" that involves "the courts' statutory or constitutional power to adjudicate the case," *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (emphasis omitted) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). It is thus a type of claim that can "be forfeited or waived." *Ibid.*

1. This Court's decision in *United States* v. *Williams*, 341 U.S. 58 (1951), makes clear that the constitutionality of the statute under which a defendant is charged and convicted is not a question of subject-matter jurisdiction. *Id.* at 66-69. The Court held in *Williams* that a district court is "authorized to render judgment on the indictment" even when the charges in the indictment are legally defective. *Id.* at 66. The Court explained that "[e]ven the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction." *Ibid.* "Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional," it nevertheless "has proceeded with jurisdiction." *Id.* at 68-69.

The Court's explication of that principle in *Williams* postdates, and for relevant purposes supersedes, the discussion in *Ex parte Siebold*, 100 U.S. 371 (1880), cited by petitioner (Br. 26, 29-30). *Siebold* addressed the scope of a court's "criminal jurisdiction" only for purposes of delimiting Court's own habeas jurisdiction under the law as it existed at that time. See 100 U.S. at

376 (citation omitted). In the era when *Siebold* was decided, such habeas review was limited to claims that "the convicting court had no jurisdiction to render the judgment which it gave," *Cotton*, 535 U.S. at 630 (citation and internal quotation marks omitted), and direct review of a criminal conviction in this Court did not exist, *ibid.* As the Court has since recognized, the Court accordingly relied on a "somewhat expansive notion of 'jurisdiction,'" *Custis* v. *United States*, 511 U.S. 485, 494 (1994), to address constitutional claims on habeas. By the middle of the twentieth century, however, this Court "finally abandoned the kissing of the jurisdictional book," *id.* at 509 (Souter, J., dissenting) (citation omitted), and openly entertained constitutional claims on habeas without maintaining a jurisdictional "fiction," *Wainwright* v. *Sykes*, 433 U.S. 72, 79 (1977).

2. Because a constitutional challenge to a statute of conviction is not "jurisdiction[al] in the modern sense," Pet. Br. 30 n.4, it is subject to forfeiture, waiver, and preclusion. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Similarly, even the "most basic rights of criminal defendants are * * * subject to waiver." *Peretz* v. *United States*, 501 U.S. 923, 936 (1991); see *id.* at 936-937 (listing examples).

Like most other constitutional claims, a challenge to a statute's constitutionality can be relinquished. "[N]one would suggest that a litigant may never waive the defense that a statute is unconstitutional." *Plaut* v. *Spendthrift*

Farm, Inc., 514 U.S. 211, 231 (1995). And "virtually all circuits" have faced forfeited "constitutional challenges to criminal statutes and have either refused to address them because the defendants had neglected to raise them below, or decided to reach them only upon determining that the lower court's failure to address them constituted 'plain error.'" *United States* v. *Baucum*, 80 F.3d 539, 541 (D.C. Cir.) (per curiam), cert. denied, 519 U.S. 897 (1996); see *id.* at 541 n.2 (citing cases). Those results would not be possible if the constitutionality of the statute of conviction were a jurisdictional issue.

3. Petitioner's suggestion (Br. 26-27, 29-34) that challenges to a statute of conviction warrant special treatment with respect to preservation is misplaced. Although an unconstitutional law can in some sense be described as "void" (*e.g.*, Pet. Br. 26 (citation omitted)), this Court has made clear that a constitutional challenge to a law—especially an as-applied challenge—does not suggest that the law is a complete nullity for all purposes. See *Williams*, 341 U.S. at 66, 68-69. Claims that a particular conviction implicates conduct beyond Congress's power to criminalize are just as subject to preservation rules as other claims. The Court has recognized, for example, that a claim that a defendant may have been "convicted based exclusively on noncriminal conduct," is subject to forfeiture when it is not raised in district court. See *United States* v. *Marcus*, 560 U.S. 258, 265 (2010); see *id.* at 260, 262, 264-265.

Petitioner's reliance (Br. 29-34) on this Court's retroactivity jurisprudence is inapt. The retroactivity inquiry concerns the scope of a judicial decision that has *already* definitively established a defendant-favorable constitutional rule, asking whether that rule should ex-

tend to cases in which direct review has already concluded. See, *e.g.*, *Welch*, 136 S. Ct. at 1264-1265. In the context of that inquiry, the Court has held that when a decision creates a new rule invalidating the substantive basis for a defendant's punishment—*e.g.*, by holding the statute of conviction unconstitutional—the defendant may potentially rely on that decision to seek collateral relief. See, *e.g.*, *Montgomery*, 136 S. Ct. at 729-732. Nothing in the Court's retroactivity doctrine, however, entitles a defendant who is challenging his statute of conviction on grounds that are not yet settled to disregard standard rules of waiver, forfeiture, and preclusion. Although such a challenge, if ultimately vindicated, could potentially produce a retroactive legal rule, that does not excuse the defendant from adherence to normal litigation standards along the way. To the contrary, treating a defendant's efforts to challenge a statute as if he had already prevailed would upend the "strong presumption of constitutionality due to an Act of Congress," *United States* v. *Watson*, 423 U.S. 411, 416 (1976) (quoting *United States* v. *Di Re*, 332 U.S. 581, 585 (1948)).

4. The distinction between challenges seeking to make new law and retroactive application of established law also illustrates the error in petitioner's contention (Br. 34-35) that defendants like him will have no recourse unless his position in this case prevails. If a later judicial decision were definitively to establish the substantive unconstitutionality of such a defendant's conviction, the imposition of punishment on the defendant would no longer be presumptively (or actually) lawful. See *Montgomery*, 136 S. Ct. at 729-730. The defendant could thus seek appropriate relief, such as by filing a motion under 28 U.S.C. 2255 collaterally attacking his

conviction and sentence. See *Davis* v. *United States*, 417 U.S. 333, 346-347 (1974) (recognizing that Section 2255 authorizes claim that defendant was convicted "for an act that the law does not make criminal"); see also 28 U.S.C. 2255(f)(3) (fresh statute of limitations for claims based on retroactive decisions of this Court).

The reason a defendant could seek such relief is because a district court's entry of judgment, whether it follows a guilty plea or otherwise, necessarily presupposes the existence of at least some tenable legal basis for the defendant's conviction and sentence. So long as such a tenable basis exists, a defendant can validly forfeit, waive, or otherwise relinquish his personal right to advance a legally uncertain challenge to it—as he does by electing to enter a plea in which he ceases to contest his legal guilt. See, *e.g.*, *United States* v. *Broce*, 488 U.S. 563, 569-574 (1989); see Part C, *infra*. But such relinquishment does not extend to a future clarification of the law that unequivocally removes the substantive basis for criminal liability. In that situation, the admissions in the plea cannot transform unlawful imprisonment into a lawful sentence.

Although a defendant's failure to challenge a statute on direct review following a guilty plea would constitute procedural default for purposes of collateral review, see *Bousley* v. *United States*, 523 U.S. 614, 621 (1998), that bar does not apply when a defendant is "actually innocent" of any substantive crime for which he could validly be punished, *id.* at 623-624, which will be the case when the only conduct for which he could have been convicted is constitutionally protected. Furthermore, the government has the ability to waive the procedural bar in cases where defendants have meritorious substantive claims, as it has done with defendants whose sentences rest on

the statutory enhancement that this Court held to be unconstitutionally vague in *Johnson* v. *United States*, 135 S. Ct. 2551, 2555, 2563 (2015).

5. Petitioner does not seek collateral relief in reliance on a settled principle of constitutional law. He instead seeks to challenge on appeal the constitutionality of prohibiting firearms on the Capitol Grounds based on arguments that are unsupported by this Court's decisions and that have been rejected by other courts of appeals. See *McDonald* v. *City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion) (explaining that Court's jurisprudence does "not cast doubt on such longstanding regulatory measures as * * * 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings'") (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 626 (2008)); see, *e.g.*, *Bonidy* v. *United States Postal Serv.*, 790 F.3d 1121, 1125-1127 (10th Cir. 2015) (rejecting Second Amendment challenge to prohibition on firearms in parking lot adjacent to post office), cert. denied, 136 S. Ct. 1486 (2016); *United States* v. *Masciandaro*, 638 F.3d 458, 460, 473-474 (4th Cir.) (rejecting Second Amendment challenge to conviction for possessing a firearm in a national-park parking lot), cert. denied, 565 U.S. 1058 (2011). He also seeks to raise a vagueness argument that he did not present to the district court. See Gov't C.A. Br. 29-31.

Petitioner has no affirmative constitutional right to raise those arguments on appeal. See *Davila* v. *Davis*, No. 16-6219 (June 26, 2017), slip op. 8 ("The Constitution * * * does not guarantee the right to an appeal at all."). To the contrary, the "right of appeal, as we presently know it in criminal cases, is purely a creature of statute." *Abney* v. *United States*, 431 U.S. 651, 656

(1977). Accordingly, complete or partial limitations on the opportunity to raise an argument in an appellate forum have a long historical pedigree. See, *e.g.*, *Martinez* v. *Court of Appeal*, 528 U.S. 152, 159 & n.7 (2000); *Abney*, 431 U.S. at 656 n.3; *Carroll* v. *United States*, 354 U.S. 394, 400 n.9 (1957). In particular, it has long been the case that a potential appellate claim can be forfeited, waived, or precluded. See, *e.g.*, *Friedenstein* v. *United States*, 125 U.S. 224, 230 (1888) (concluding that argument that defendant had failed properly to raise in district court "must be regarded as having been waived, or as having been cured by the verdict").

B. Federal Rule Of Criminal Procedure 11(a)(2) Requires A Defendant To Enter A Conditional Plea In Order To Challenge The Constitutionality Of The Statute Of Conviction On Appeal

Petitioner relinquished his right to challenge 40 U.S.C. 5104(e) on appeal by failing to preserve his claims through a conditional plea under Federal Rule of Criminal Procedure 11(a)(2). A defendant's statutory right to appeal is subject to this Court's delegated "power to prescribe general rules of practice and procedure * * * for cases in the United States district courts * * * and courts of appeals." 28 U.S.C. 2072(a). Although such rules may "not abridge, enlarge or modify any substantive right," 28 U.S.C. 2072(b), they are "as binding as any statute duly enacted by Congress" on matters of procedure, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). They can thus be applied to foreclose or limit an appeal. See, *e.g.*, *Manrique* v. *United States*, 137 S. Ct. 1266, 1271-1274 (2017) (enforcing rule-based timing requirement for criminal appeals). Here, Rule 11(a)(2) requires that a defendant explicitly preserve any constitutional challenge to his

statute of conviction in order to raise that challenge on appeal following a guilty plea.

1. Rule 11(a)(2) precludes appeal of pretrial issues that were not expressly reserved in the defendant's guilty plea

Rule 11(a)(2) provides that "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2); see *ibid.* ("A defendant who prevails on appeal may then withdraw the plea."). When a defendant follows that procedure, he ensures that the parties and the court have a mutual understanding of the respects in which he does not intend his plea to be final. When, however, he forgoes that procedure, he relinquishes appeal rights he might otherwise have preserved.

a. Rule 11(a)(2) allows a defendant to designate his plea as "conditional" on the appellate resolution of an issue that was the subject of an "adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2). In order to do so, the defendant must "reserv[e] in writing the right to have an appellate court review" that issue. *Ibid.* The natural implication of those textual preconditions is that a defendant who pleads guilty *cannot* challenge his conviction on appeal on a forfeitable or waivable ground that he either failed to present to the district court or failed to reserve in writing. See, *e.g.*, *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004) (concluding that the "natural meaning" of a statute allowing someone to "'seek contribution . . . during or following'" a particular type of "'civil action'" was "that contribution may only be

sought subject to the specified conditions") (emphasis and citation omitted); *Continental Cas. Co.* v. *United States*, 314 U.S. 527, 533 (1942) ("The statement of the conditions negatives action without the satisfaction of those requirements.").

That textual implication is reinforced by other features of the Rules. For example, Rule 32 requires a district court to advise a defendant of his "right to appeal the conviction" only when he has "pleaded not guilty," Fed. R. Crim. P. 32(j)(1)(A); a defendant who has pleaded guilty is advised only of his "right to appeal the sentence," Fed. R. Crim. P. 32(j)(1)(B). Similarly, Rule 11 itself requires a district court conducting a plea colloquy to discuss with the defendant only a "plea-agreement provision waiving the right to appeal or to collaterally attack the sentence," Fed. R. Crim. P. 11(b)(1)(N), suggesting that a plea-agreement provision waiving rights to appeal the conviction would generally be redundant of preexisting limitations.

b. Where the Rules do anticipate appeals of plea-based convictions, they do so only with respect to procedural issues concerning the plea itself, not the substance of the conviction. And even then they circumscribe the scope of appellate review to advance the strong systemic interest in finality.

Rule 11(h) explicitly provides that a "variance from the requirements" of Rule 11 itself, which governs plea procedures, are subject to harmless-error review on appeal. Fed. R. Crim. P. 11(h); see, *e.g.*, *United States* v. *Vonn*, 535 U.S. 55, 58 (2002). The Advisory Committee, while acknowledging that the "interest in finality" of guilty pleas "is of somewhat lesser weight when a direct appeal is involved" than "in the collateral attack con-

text," nevertheless found the finality interest "sufficiently compelling" in the appellate setting to warrant limitations on review. Fed. R. Crim. P. 11 advisory committee's note (1983).

In addition, this Court has itself interpreted the Federal Rules, with "finality" concerns in mind, to foreclose appellate relief for claims of Rule 11 error that were not raised in district court, unless the stringent plain-error requirements of Rule 52(b) are satisfied. *Vonn*, 535 U.S. at 72-74. The Court has further explained that the application of that plain-error standard "should respect the particular importance of the finality of guilty pleas, which usually rest, after all, on a defendant's profession of guilt in open court, and are indispensable in the operation of the modern criminal justice system." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82-83 (2004).

2. Rule 11(a)(2)'s preservation requirement applies to a claim that the statute of conviction is unconstitutional

Rule 11(a)(2)'s prerequisites apply, without qualification, to any forfeitable issue that may be raised in a "pretrial motion." Fed. R. Crim. P. 11(a)(2). Nothing in the text of the Rule creates or suggests an exception to its procedural requirements for challenges to a defendant's statute of conviction. And the Advisory Committee Notes confirm that no such exception was intended.

a. The Notes explain that "the availability of a conditional plea under specified circumstances will aid in clarifying the fact that traditional, unqualified pleas do constitute a waiver of nonjurisdictional defects." Fed. R. Crim. P. 11 advisory committee's note (1983). That explanation reinforces the Rule's unqualified text by

making clear that the Committee intended an unconditional guilty plea to renounce all waivable claims—a set that includes a claim challenging the constitutionality of the statute of conviction.

The standard definition of "jurisdictional" in the judicial context, both when Rule 11(a)(2) was enacted and now, refers to "the authority by which courts and judicial officers take cognizance of and decide cases." *Black's Law Dictionary* 766 (5th ed. 1979) (defining "jurisdiction"); see *ibid.* (similar alternative definitions of "jurisdiction"); *ibid.* (defining "jurisdictional," as relevant here, to mean "[p]ertaining or relating to jurisdiction"); *id.* at 336 (defining "criminal jurisdiction" as "[p]ower of tribunal to hear and dispose of criminal cases"); see also *Black's Law Dictionary* 980 (10th ed. 2014). A defect that is "jurisdictional"—*i.e.*, one that goes to the court's "power to adjudicate"—is one that "can never be forfeited or waived." *Cotton*, 535 U.S. at 630 (emphasis omitted).

The Committee's statement thus illustrates that Rule 11(a)(2) was designed to bring as much finality and certainty as possible to guilty pleas by ensuring that an unconditional plea would foreclose any subsequent appellate claim that is subject to forfeiture. The Committee viewed such a "traditional plea of guilty" as having "complete finality," because it admits both "legal guilt" and "factual guilt." Fed. R. Crim. P. 11 advisory committee's note (1983) (citation omitted). And it viewed a conditional plea as having nearly as much finality, because it admits "factual guilt" and the defendant's admission of "legal guilt" will be disturbed only "if the reserved issue is ultimately decided in the government's favor" on appeal. *Ibid.* (citation omitted). The Committee did not, however, intend to leave open the additional

possibility of reversal on appeal of a nonjurisdictional claim that the defendant failed to reserve, such as a challenge to the constitutionality of the statute of conviction.

b. Had the Committee intended such a challenge to be exempt from the Rule's requirements, and thus to intrude on the finality of a plea, it would have said so. But the unqualified text of the Rule, and the Notes' use of the term "nonjurisdictional," convey the opposite, particularly given the drafters' intent that defendants "identify precisely what pretrial issues have been preserved for appellate review." Fed. R. Crim. P. 11 advisory committee's note (1983).

Indeed, although some sources cited in the Notes erroneously described challenges to a statute of conviction as "jurisdictional," the Committee itself did not repeat, let alone endorse, such inaccuracy. Compare, *e.g.*, *United States* v. *Cox*, 464 F.2d 937, 940-941 (6th Cir. 1972), and John D. Botsford, Comment, *Conditioned Guilty Pleas*, 26 UCLA L. Rev. 360, 360 n.1 (1978), with Fed. R. Crim. P. 11 advisory committee's note (1983). The Committee could not have intended silently to depart from *Williams*'s understanding about the nonjurisdictional nature of such challenges, particularly when circuit practices about allowing such challenges after a plea were not entirely uniform, see *Shaffer* v. *United States*, 435 F.2d 168, 168 (9th Cir. 1970) (per curiam) (holding that plea precluded collateral as-applied constitutional challenge to statute of conviction).

c. Petitioner errs in reading (Br. 37-38) the Notes' brief discussion of *Menna* v. *New York*, *supra*, and *Blackledge* v. *Perry*, *supra*, to implicitly exempt constitutional challenges to a statute of conviction from Rule 11(a)(2). The Committee observed, citing *Menna* and

Blackledge, that this Court had "held that certain kinds of constitutional objections may be raised after a plea of guilty." Fed. R. Crim. P. 11 advisory committee's note (1983). It parenthetically described *Menna* as involving a "double jeopardy violation" and *Blackledge* as involving a "due process violation by charge enhancement following [a] defendant's exercise of [a] right to trial de novo." *Ibid.* The Committee explained that Rule 11(a)(2) "has no application to such situations, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application." *Ibid.*

At the time the Notes were written, the Committee may well have believed that the particular "kinds of constitutional objections" at issue in *Blackledge* and *Menna* were unwaivable and thus beyond the permissible scope of the preservation procedures that the Rule's unqualified text requires. It was not until four years later that this Court's "decision in *Ricketts* v. *Adamson*, 483 U. S. 1 (1987), made clear that the protection against double jeopardy is subject to waiver." *Broce*, 488 U.S. at 568; see *ibid.* (noting a court of appeals' mistake on this point); see also *Menna*, 423 U.S. at 62 n.2 (disavowing holding on general waivability of double-jeopardy claims). The nonjurisdictional nature of a constitutional challenge to a statute of conviction, in contrast, had been clarified in *Williams*, long before Rule 11(a)(2) was promulgated. That is presumably why the Committee, while highlighting two "kinds of constitutional objections" as exempt from the Rule, omitted any similar mention of constitutional challenges to statutes.

Particularly damaging to petitioner's view is the Committee's omission of any reference to *Haynes* v.

United States, 390 U.S. 85 (1968). In *Haynes*, the defendant had raised an as-applied constitutional challenge to a criminal statute in district court before pleading guilty, and this Court—without objection from the government or analysis beyond citation of a single circuit decision—permitted the renewal of that challenge on appeal. *Id.* at 86-87, 90 & n.2 (citing *United States* v. *Ury*, 106 F.2d 28 (2d Cir. 1939)). The Advisory Committee was doubtless aware of *Haynes*—which was cited in decisions mentioned in the Notes, see, *e.g.*, *Cox*, 464 F.2d at 940-941—but did not associate it with *Blackledge* and *Menna* or separately identify it as exemplifying a procedure that it viewed to be permissible. To the contrary, the Committee made clear that a procedure of the sort employed in *Haynes*, in which the filing of a pretrial motion was alone deemed sufficient to preserve an issue for a post-plea appeal, would not be allowed under Rule 11(a)(2). See Fed. R. Crim. P. 11 advisory committee's note (1983) (explaining that Rule 11(a)(2) would "avoid * * * post-plea claims by the defendant that his plea should be deemed conditional merely because it occurred after denial of his pretrial motions"); see also *Bank of Nova Scotia*, 487 U.S. at 254 (recognizing that Federal Rules displace courts' supervisory authority).

3. Requiring express preservation of constitutional challenges to statutes through a conditional plea furthers the interests underlying Rule 11(a)(2)

Allowing a challenge to the statute of conviction on appeal in the absence of a conditional plea under Rule 11(a)(2) would subvert the Rule's goals. Cf. *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702, 1707 (2017) (rejecting procedural "tactic" for appealing an issue that would, *inter alia*, "subvert the balanced solution * * * put in place" by a Federal Rule of Civil Procedure).

a. The Committee intended Rule 11(a)(2) "to conserve prosecutorial and judicial resources and advance speedy trial objectives," by "avoid[ing] the necessity for trials which are undertaken for the sole purpose of preserving pretrial objections." Fed. R. Crim. P. 11 advisory committee's note (1983). In designing the Rule's procedures, the Committee respected the "interest in achieving finality," by limiting an appeal following a plea to the "reserved issue." *Ibid.* (citation omitted). It also respected the interest in clarity, by requiring documentation "that a particular plea was in fact conditional," with a record of the "precise[] * * * pretrial issues [that] have been preserved." *Ibid.*

Exempting claims that the statute of conviction is unconstitutional from the conditional-plea procedure would undermine the interests in efficiency, finality, and clarity that the Rule promotes. The goal of a conditional plea is that it be "entered with the clear understanding and expectation by the [government], the defendant, and the courts that it will not foreclose judicial review of the merits of the [reserved] alleged constitutional violations." *Lefkowitz*, 420 U.S. at 290. Such an understanding is particularly helpful when the plea is the product of negotiation, so that the government knows exactly what it gets for its concessions in the plea agreement. See *Broce*, 488 U.S. at 576 (noting potential for a "plea bargain which incorporates concessions by the Government" to "heighten[] the already substantial interest the Government has in the finality of the plea") (emphasis omitted).

The Rule's requirement that the court and the government agree with the defendant that a particular issue should be reserved for a post-plea appeal also plays an important role. See Fed. R. Crim. P. 11(a)(2). The

Committee recognized that allowing a defendant to reserve issues unilaterally could result in wasteful litigation. A defendant might, for example, attempt to appeal "on a matter which can only be fully developed by proceeding to trial." Fed. R. Crim. P. 11 advisory committee's note (1983). Or he might seek to raise an issue that would not "dispose of the case" and would "only serve to postpone the trial and require the government to try the case after substantial delay." *Ibid.* The court and the government provide an effective screen against such unproductive appeals. *Ibid.*

b. Petitioner contends (Br. 38) that "[i]t would make little sense" to require the government's concurrence in a conditional plea that seeks to preserve a challenge to the statute of conviction. But the Committee explained that although "the conditional plea device will be most commonly employed" in relation to a "motion to suppress evidence," the "objectives of the rule are well served by extending it to other pretrial rulings as well." Fed. R. Crim. P. 11 advisory committee's note (1983). That includes pretrial rulings rejecting a constitutional challenge to the underlying criminal statute.

Such a challenge will not automatically be fit for appellate review. It may, for example, not be "case-dispositive," Fed. R. Crim. P. 11 advisory committee's note (1983), as where it relates to only one of multiple means by which the government might prove that the defendant committed the charged offense. Or constitutional challenges, particularly as-applied challenges, may benefit from factual development that did not occur in the context of any pretrial proceedings. See *ibid.*; see also, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 626-627 (1994) (remanding case challenging constitutionality of statute for further factual development).

Here, for example, petitioner's own arguments suggest that his Second Amendment or vagueness claims may be informed by, *inter alia*, the precise location in which he parked his Jeep, the presence of visible indications that the area was on the Capitol Grounds, and enforcement practices under the statute. See, *e.g.*, C.A. Amicus Br. 32, 53. But even if no further factual development were necessary, appeal would still be precluded in light of petitioner's failure to provide the court and the government with an upfront understanding of, and opportunity to address, the proper scope of appellate review.

c. As a general matter, the government may not typically offer, or always be open to, conditional pleas. See, *e.g.*, NACDL Amicus Br. 20-21 (citing small number of cases discussing issue in context of suppression claims). But petitioner errs in suggesting (Br. 38) that the Rule must be interpreted to exempt challenges to a statute of conviction from the requirement that the government concur in a conditional plea. Petitioner provides no empirical evidence that the government habitually withholds consent for conditional pleas in the rare cases in which a defendant raises a colorable legal challenge to the constitutionality of the charging statute. And he identifies no practical justification for singling out those cases as ones in which the consent requirement would be problematic.

An appendix to this brief lists more than 50 decisions from the federal courts of appeals that expressly note the use of a conditional plea to preserve an appellate challenge to the constitutionality of the statute of conviction. Several recent opinions in this Court have similarly explicitly mentioned the use of that procedure to preserve such claims. See, *e.g.*, *Bond* v. *United States*, 134 S. Ct. 2077, 2085-2086 (2014) (Tenth Amendment

challenge); *United States* v. *Alvarez*, 567 U.S. 709, 713-716 (2012) (plurality opinion) (First Amendment challenge); *Carr* v. *United States*, 560 U.S. 438, 441-442 (2010) (ex post facto challenge); see also, *e.g.*, *Small* v. *United States*, 544 U.S. 385, 387 (2005) (challenge to statute's scope). No reason exists to presume that conditional pleas based on constitutional challenges to statutes are being unreasonably blocked by the government's failure to consent.

C. An Unconditional Guilty Plea Inherently Relinquishes An Appellate Challenge To The Constitutionality Of The Statute Of Conviction

The procedural requirements of Rule 11(a)(2) are alone sufficient to resolve this case. Petitioner identifies no affirmative right that would entitle a defendant who has failed to preserve a constitutional challenge to his statute of conviction in accordance with Rule 11(a)(2) to nevertheless raise such a challenge on appeal. He contends (Br. 1) only that such a challenge is not "inherently waived or foreclosed" by the unconditional plea itself. Even that, however, is incorrect. The natural consequence of a defendant's unconditional acquiescence to a legal judgment of conviction is to foreclose constitutional claims incompatible with that judgment—including challenges to the statute underlying it, insofar as they seek to make new law.

1. A constitutional challenge to the statute of conviction is inconsistent with unconditional consent to a judgment of conviction that presumes legal guilt

a. The inherent finality of a guilty plea is achieved by defining the plea as an acknowledgment of both factual and legal guilt that is in itself sufficient to support the entry of judgment. "By entering a plea of guilty,

the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *Broce*, 488 U.S. at 570. The plea thus represents "the defendant's consent that judgment of conviction may be entered without a trial." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); see, *e.g.*, *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (explaining that a guilty plea is "itself a conviction") (quoting *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969)). Once the court has accepted the plea, "nothing remains but to give judgment and determine punishment." *Boykin*, 395 U.S. at 242; see *Machibroda* v. *United States*, 368 U.S. 487, 492 (1962); *Kercheval* v. *United States*, 274 U.S. 220, 224 (1927).

The inherent conclusiveness of a plea-based conviction limits the ways in which that conviction may be attacked. "[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." *Broce*, 488 U.S. at 569. "If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack." *Ibid.* The Court has accordingly held that a guilty plea precludes, for example, post-plea claims alleging that the charging statute had an unconstitutional penalty provision, see, *e.g.*, *Brady*, 397 U.S. at 749-758; that a confession was coerced, see *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970); that a grand jury was improperly constituted, see *Tollett* v. *Henderson*, 411 U.S. 258, 266-267 (1973); and that a defendant was unconstitutionally convicted of two offenses instead of one, see *Broce*, 488 U.S. at 565. See *Tollett*, 411 U.S. at 266 (ex-

plaining that *Brady* and *McMann* "foreclose direct inquiry into the merits of claimed antecedent constitutional violations" as well as claims that they affected the plea's voluntariness).

That preclusion principle applies even without a "conscious waiver * * * with respect to each potential defense relinquished by [the] plea of guilty." *Broce*, 488 U.S. at 573. "Relinquishment," this Court has explained, "derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea." *Id.* at 573-574. And because the relinquishment is inherent in the plea itself, preclusion applies not only on collateral review, but also on direct appeal. See, *e.g.*, Pet. Br. 21-22 (making no distinction between collateral and direct review). This Court has recognized, for example, a default rule in state court that a defendant "must plead not guilty and go to trial to preserve the opportunity for state appellate review of his constitutional challenges to arrest, admissibility of various pieces of evidence, or the voluntariness of a confession." *Lefkowitz*, 420 U.S. at 289. "Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained." *Ibid.* The same default rule applies in the federal system. See *id.* at 288 (deriving the rule from, *inter alia*, *Brady* v. *United States*, *supra*); Pet. Br. 16-34 (relying interchangeably on state and federal cases).

b. Unless he is relying on a newly established rule of constitutional law that is necessarily beyond the scope

of the plea, see p. 20, *supra*, a defendant who unconditionally accepts the entry of judgment from the district court premised on his legal guilt cannot then seek to undo the judgment on appeal by contesting legal guilt. "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *Broce*, 488 U.S. at 569. One of the "legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence," *ibid.*, is the defendant's "admission of guilt of a substantive criminal offense as charged in [the] indictment," *Libretti* v. *United States*, 516 U.S. 29, 38 (1995). Although that admission would not preclude reliance on a future retroactive rule that eliminates any current legal basis for punishment, it necessarily concedes that the conviction is not barred by then-applicable law and consents to the entry of a valid judgment. A defendant's about-face on appeal to seek a new legal rule that invalidates judgment on the substantive offense charged in the indictment, therefore, repudiates the core premise of his plea.

For that reason, "[w]hen a defendant admits guilt of a substantive crime, he cannot reverse course on appeal and claim the criminal statute is unconstitutional." *United States* v. *De Vaughn*, 694 F.3d 1141, 1154 (10th Cir. 2012), cert. denied, 133 S. Ct. 2383 (2013). A guilty plea reflects a defendant's "strategic choice" to accept "conviction," *Nixon*, 543 U.S. at 187, on the expectation that it is in his best interest (*e.g.*, for sentencing purposes) to do so. See, *e.g.*, *North Carolina* v. *Alford*, 400 U.S. 25, 32, 36 (1970); *Brady*, 397 U.S. at 752. In entering such a plea, a defendant accepts that he may be treated as legally guilty, even if additional proceedings might have established that he is not. See, *e.g.*,

Broce, 488 U.S. at 571 (holding that defendants' guilty plea to two conspiracy charges was in lieu of an "attempt to show the existence of only one conspiracy in a trial-type proceeding"). Indeed, this Court has recognized that a defendant may validly acquiesce in treatment consistent with legal guilt even *without* explicitly acknowledging such guilt. *Alford*, 400 U.S. at 33-39. "[T]he Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence." *Id.* at 36.

c. A plea, and its corresponding concessions, are valid so long as "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Alford*, 400 U.S. at 31. Once "a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged," he may "attack the voluntary and intelligent character of the guilty plea" itself, *Tollett*, 411 U.S. at 267, but generally may not attack the law and facts undergirding the conviction, *ibid.*; see *Broce*, 488 U.S. at 569.

A challenge to the statute of conviction does not impugn the voluntary and intelligent nature of the plea, or otherwise suggest that the plea was defective. Although "a plea does not qualify as intelligent unless a criminal defendant first receives real notice of the true nature of the charge against him," the defendant's receipt of a copy of his indictment, "standing alone, give[s] rise to a presumption" that such notice was provided. *Bousley*, 523 U.S. at 618 (citation and internal quotation marks omitted). Additional circumstances may rebut

that presumption; a defendant can, for example, challenge the knowing and intelligent nature of his plea on appeal when the district court affirmatively "misinformed" him about "the essential elements of the crime with which he was charged." *Ibid.*; see *id.* at 621-622. But a knowing and intelligent plea does not require that the district court inform the defendant, or that the defendant comprehend, potential constitutional challenges to the underlying statute.

The Court "has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *United States* v. *Ruiz*, 536 U.S. 622, 630 (2002). In particular, a plea may be knowing, intelligent, and valid notwithstanding a defendant's misapprehension about the availability of a "potential defense," *ibid.* (citing *Broce*, 488 U.S. at 573), including a constitutional defense that would if successful preclude conviction on a particular charge, see *Broce*, 488 U.S. at 573-574 (double-jeopardy claim). The Court has also rejected challenges to the knowing and voluntary nature of a plea where the defendant was charged under a statute with a death-penalty provision later held unconstitutional, the effect of which was to make a guilty plea the only way to avoid the possibility of a death sentence. See *Brady*, 397 U.S. at 749-758; see also *Parker* v. *North Carolina*, 397 U.S. 790, 794-795 (1970) (same).

A defendant's lack of awareness of unproven constitutional objections when he pleaded guilty would at most give rise to a claim of ineffective assistance of

counsel. See *Broce*, 488 U.S. at 574; *Tollett*, 411 U.S. at 267; see also, *e.g.*, *Hill* v. *Lockhart*, 474 U.S. 52, 59-60 (1985). It would not entitle the defendant to contravene the "admissions necessarily made upon entry of a voluntary plea of guilty," *Broce*, 488 U.S. at 573-574, by challenging the constitutionality of the statute supporting the judgment of legal guilt to which he voluntarily consented.

2. No exception to the preclusive effect of a guilty plea allows for an appellate challenge to the constitutionality of the statute of conviction

This Court's decisions in *Blackledge* and *Menna* recognized "[a]n exception" to the general preclusive effect of a guilty plea. *Broce*, 488 U.S. at 574. That exception does not encompass a defendant's claim that the statute underlying the conviction is unconstitutional. *Blackledge* addressed a claim of prosecutorial vindictiveness under the Due Process Clause; *Menna* addressed a claim under the Double Jeopardy Clause. In both cases, the Court viewed the relevant constitutional violation to be the filing of the charges that forced the defendant to enter a plea, not the substance of the conviction itself.

a. In *Blackledge*, the defendant pleaded guilty to a felony charge filed by the State in retaliation for the defendant's appeal of a conviction on a misdemeanor charge for the same conduct. 417 U.S. at 22-23. The "nature of the * * * constitutional infirmity" asserted on federal habeas review was that "the State * * * was, under the facts of th[e] case, simply precluded by the Due Process Clause from calling upon [the defendant] to answer to the more serious charge." *Id.* at 30. The Court concluded that the guilty plea "did not foreclose a subsequent challenge because * * * the defendant's right was 'the right not to be haled into court at all upon

the felony charge'" to which he had pleaded, and "'[t]he very initiation of proceedings against him . . . thus operated to deny him due process of law.'" *Broce*, 488 U.S. at 574-575 (quoting *Blackledge*, 417 U.S. at 30-31). The Court distinguished the defendant's claim from claims that it had previously held to be precluded by a guilty plea on the ground that none of the precluded claims "went to the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge*, 417 U.S. at 30.

In *Menna*, the defendant pleaded guilty to a charge of refusing to answer grand-jury questions, after having already been subject to a contempt adjudication for the same conduct. 423 U.S. at 61; see *id.* at 62 n.2. On direct review, this Court summarily reversed a state appellate court's determination that the defendant's claim under the Double Jeopardy Clause had "been 'waived' by [his] counseled plea of guilty." *Id.* at 62. The Court explained, citing *Blackledge*, that "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Ibid.* The Court "h[eld] that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Id.* at 63 n.2.

b. "Only a broad reading of *Blackledge* and *Menna*, unmoored from their factual and legal bases, would support the conclusion that the right 'not to be haled into court' extends to claims that criminal statutes are unconstitutional." *De Vaughn*, 694 F.3d at 1154.

The claims at issue in *Blackledge* and *Menna* challenged the prosecutorial act of filing the charges. Compare *Williams*, 341 U.S. at 66, 68-69, with *Menna*, 423 U.S. at 61-62, and *Blackledge*, 417 U.S. at 30-31. Each charge, "judged on its face," was asserted to be "one which the State [could] not constitutionally prosecute," *Menna*, 423 U.S. at 63 n.2, and thus "the very act of haling the defendants into court completed the constitutional violation" that was alleged, *United States* v. *Miranda*, 780 F.3d 1185, 1190 (D.C. Cir. 2015); see *Menna*, 423 U.S. at 62; *Blackledge*, 417 U.S. at 30. A double-jeopardy claim, as was at issue in *Menna*, is so intrinsically directed at "the very authority of the Government to hale [the defendant] into court to face trial," and so "completely independent of his guilt or innocence," that its denial may be appealed even before trial begins. *Abney*, 431 U.S. at 659-660. And the prosecutorial-vindictiveness claim at issue in *Blackledge*, while not subject to interlocutory appeal, see *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 264, 268 (1982) (per curiam), was closely akin to a double-jeopardy claim, see *Blackledge*, 417 U.S. at 31, and likewise challenged "the very initiation of the proceedings," *id.* at 30.

An attack on the constitutionality of the statute of conviction, in contrast, does not challenge "the very initiation of the proceedings"; it challenges the result of those proceedings—the entry of a conviction. At least in the absence of any binding decisional law dictating that a statute is unconstitutional on its face or as applied, the presumption that a statute is constitutional attaches to the initiation of a prosecution for the conduct it criminalizes. Cf., *e.g.*, *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 (1979) (recognizing that police officers

can rely on the presumptive constitutionality of the statutes that they enforce). And when such charges are filed, the district court has authority to hear the case. See *Williams*, 341 U.S. at 66-69. A challenge to the constitutionality of the statute is therefore not a challenge to "the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge*, 417 U.S. at 30. It is instead a claim that, because the government "enforce[d] a proscription or penalty barred by the Constitution, *the resulting conviction or sentence* is * * * unlawful." *Montgomery*, 136 S. Ct. at 729-730 (emphasis added); see, *e.g.*, *id.* at 730 ("A conviction under an unconstitutional law * * * 'is illegal and void, and cannot be a legal cause of imprisonment.'") (quoting *Siebold*, 100 U.S. at 376-377).

The distinction is critical, because it is the conviction, not the filing of the charges, to which the defendant consents by pleading guilty. A defendant who is unlawfully brought before the court and forced to choose between a plea or a trial has not acquiesced in the lawfulness of the act that put him to that very choice. See *Broce*, 488 U.S. at 575 ("In *Blackledge*, the concessions implicit in the defendant's guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all."); *Blackledge*, 417 U.S. at 30; cf. *Santobello* v. *New York*, 404 U.S. 257, 262 (1971) ("The plea must, of course, be voluntary."). Due to the invalidity of that act, "the court ha[s] no power to enter the conviction or impose the sentence," *Broce*, 488 U.S. at 569, inasmuch as it should not even have received the case. The situation is different, however, when the alleged defect is not with the act of initiating the proceedings, but instead with the substan-

tive law underlying the conviction. In that circumstance, "a federal court has power * * * to proceed to a determination on the merits," *Williams*, 341 U.S. at 68, and a defendant can fairly be held to his decision to accept, rather than contest, a judgment of legal guilt.

c. The opinions in *Ellis* v. *Dyson*, 421 U.S. 426 (1975), which were issued in the 18 months between *Blackledge* and *Menna*, demonstrate the Court's awareness of the relevant distinction between challenges to a statute of conviction and double-jeopardy or prosecutorial-vindictiveness claims. In *Ellis*, the defendants had pleaded nolo contendere to a criminal charge, but later filed a civil suit seeking, *inter alia*, to expunge their records of conviction on the ground that the underlying criminal law was unconstitutional. See *id.* at 428-430. The majority opinion left open whether such relief would be proper, see *id.* at 435, but Justice Powell addressed the issue in a dissenting opinion joined by Justice Stewart, the author of *Blackledge*, see *id.* at 437-452. In explaining his view that such relief would be unavailable, Justice Powell distinguished *Blackledge* on the ground that the "alleged constitutional infirmity" in a challenge to a substantive criminal law "lies not in the 'initiation of the proceedings' but in the eventual imposition of punishment that, assertedly, the State cannot constitutionally exact." *Id.* at 442 n.7 (quoting *Blackledge*, 417 U.S. at 30). Although Justice Powell was not speaking for the Court in *Ellis*, his separate writing shows that Members of the Court identified the distinction; illustrates Justice Powell's and Justice Stewart's understanding of Justice Stewart's majority opinion in *Blackledge*; and cautions against reading the six-Justice per curiam opinion in *Menna*, which both of those Justices joined half a year later, in an overly broad manner.

3. *Petitioner's reliance on* Blackledge *and* Menna *is misplaced*

Petitioner appears to recognize that *Blackledge* and *Menna* hold only "that where a defendant pleads guilty, but then asserts a right *that would have prevented the government from prosecuting him at all*—such as the right not to be vindictively prosecuted or to be put into double jeopardy—the assertion of that right is not inherently waived or foreclosed by the guilty plea." Br. 1 (emphasis added). He errs in his view that a "defendant's right *not to be convicted* pursuant to an unconstitutional statute plainly falls into this category," *ibid.* (emphasis added). Petitioner's asserted equivalence between a right to avoid having to plead at all and a right to avoid conviction is misconceived.

a. To the extent petitioner reads (*e.g.*, Br. 23) language from a footnote in *Menna* as limiting the preclusive effect of a guilty plea solely to issues of factual guilt, that limitation cannot be squared with this Court's later decision in *United States* v. *Broce*, *supra*.

In a footnote, *Menna* rejected the proposition that certain prior cases "st[ood] for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations." 423 U.S. at 62 n.2 (citing *Tollett*, 411 U.S. 258, and cases cited therein). "The point of these cases," the Court stated, "is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Ibid.* (emphasis omitted). "In most cases," the Court continued, "factual guilt is a sufficient basis for the State's imposition of punishment," and a "guilty plea, therefore, simply renders irrelevant those constitutional viola-

tions not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." *Ibid.* The Court contrasted such violations with the violation alleged in *Menna* itself, which suggested that "the State may not convict [the defendant] no matter how validly his factual guilt is established." *Id.* at 63 n.2.

Although the *Menna* footnote focused on factual guilt, "*Broce* made clear that a guilty plea admits more than simply the facts underlying guilt." *De Vaughn*, 694 F.3d at 1154. *Broce* explained that a "plea of guilty and the ensuing conviction comprehend all of the factual *and legal* elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." 488 U.S. at 569 (emphasis added); see *id.* at 570. *Broce*'s own discussion of the summary disposition in *Menna* accordingly omits any mention of the fact-focused discussion in the footnote—which, if read in the broad manner suggested by petitioner, would be at odds with other plenary decisions of this Court as well. See *id.* at 575; see, *e.g.*, *Alford*, 400 U.S. at 32 (guilty plea "usually subsumes both" the defendant's "admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind"); *Boykin*, 395 U.S. at 242 (guilty plea "is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment").

The only decision of this Court that quotes the relevant portion of the *Menna* footnote is another pre-*Broce* decision, *Haring* v. *Prosise*, 462 U.S. 306 (1983). See *id.* at 321. In that case, the Court concluded that a

guilty plea does not foreclose a later civil claim for damages against law enforcement officers for Fourth Amendment violations committed while investigating the crime. See *id.* at 308, 323. The Court reasoned, in part, that the preclusive effect of a guilty plea with respect to a Fourth Amendment claim "does not rest on any notion of waiver, but rests on the simple fact that the claim is irrelevant to the constitutional validity of the conviction." *Id.* at 321. The Court did not consider whether, let alone hold that, a defendant who unconditionally concedes the substantive validity of a conviction in district court may nevertheless challenge that validity on appeal.

b. Petitioner also errs (*e.g.*, Br. 11, 31-32) in reading *Blackledge* to limit the preclusive effect of a guilty plea to claims of "procedural" defects that could "be 'cured' by the government" if it prosecuted the case in a different manner. Petitioner appears to derive that limitation from a distinction *Blackledge* drew between the prosecutorial-vindictiveness claim in that case and two types of claims it had previously held to be precluded by a guilty plea. The Court noted that whereas the prosecutorial-vindictiveness claim "went to the very power of the State to bring the defendant into court to answer the charge brought against him," defendants claiming coerced confessions "could surely have been brought to trial without the use of the allegedly coerced confessions," and "even a tainted indictment" returned by an improperly constituted grand jury "could have been 'cured' through a new indictment by a properly selected grand jury." 417 U.S. at 30.

That discussion, which identifies one salient feature of claims that challenge the commencement of proceed-

ings, does not suggest that a guilty plea *only* relinquishes claims that the government could have "cured" by initiating or conducting the proceedings in some other way. Indeed, any such interpretation is difficult to square with *Brady* v. *United States*, *supra*, which held that a guilty plea precludes a claim that the charging statute contained an unconstitutional death-penalty provision. See 397 U.S. at 746, 749-758; see also *Tollett*, 411 U.S. at 265-266 (discussing scope of *Brady*'s holding). That constitutional defect can only be "cured" through judicial invalidation of the unlawful provision. See *United States* v. *Jackson*, 390 U.S. 570, 591 (1968).

c. Finally, petitioner is mistaken in contending (Br. 27) that his broad reading of *Blackledge* and *Menna* is supported by this Court's decision in *Haynes*. *Haynes* involved a defendant's claim—which he raised before pleading guilty, then pressed in the court of appeals and this Court—that the charging statute violated his right against compelled self-incrimination. See 390 U.S. at 86-87 & nn.1-2. The government briefed the merits of the claim without arguing that it was precluded, see U.S. Br. at 4-32, *Haynes*, *supra* (No. 67-236), and the Court's decision included a one-sentence footnote, citing a single court of appeals decision, stating that the defendant's "plea of guilty did not, of course, waive his previous claim of the constitutional privilege." 390 U.S. at 87 n.2.

As petitioner appears to recognize by deploying it only in a supporting role, that one-sentence footnote (which would not even apply to the vagueness claim that petitioner failed to raise in district court) does not control this case. As a threshold matter, the footnote does not represent a considered determination of this Court following briefing and argument. See *McCutcheon* v.

FEC, 134 S. Ct. 1434, 1447 (2014) (plurality opinion) (reasoning, under the circumstances, that "this case cannot be resolved merely by pointing to three sentences in [a prior decision] that were written without the benefit of full briefing or argument on the issue") (citing *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 139-140 (1941); *Hohn* v. *United States*, 524 U.S. 236, 251 (1998)). It is thus entitled to little more weight than other cases in which no preclusion issue was considered. See Pet. Br. 28-29 (discussing *Loving* v. *Virginia*, 388 U.S. 1 (1967)). It also predates this Court's decisions recognizing the inherent preclusive effect of guilty pleas, none of which (including *Blackledge* and *Menna*) discusses or even cites *Haynes*. In fact, the *Haynes* footnote has not been cited by any subsequent decision of this Court.

In any event, *Haynes* at most reflects this Court's view, at that time, that a defendant who raised a constitutional claim before pleading guilty should not be deemed to have "waive[d]" it by pleading guilty, 390 U.S. at 87 n.2, and could raise it in an appellate forum, when the government did not object. Even assuming that practice were consistent with the later adoption of Rule 11(a)(2), see p. 29, *supra*, it would have no application where the government does seek to hold the defendant to the admissions inherent in his plea.

D. Petitioner Knowingly Waived His Appellate Rights During the Plea Colloquy

In this particular case, petitioner's relinquishment of his right to raise his constitutional claims on appeal is independently supported by the circumstances of his plea. Although petitioner correctly notes (Br. 18-20) that he did not waive his claims in his written plea

agreement, he was warned during the plea colloquy that his guilty plea would have that effect.

1. At the plea colloquy, petitioner explicitly agreed to "give up most of [his] rights to an appeal," subject only to particular "exceptions" that had been "mentioned" by the district court. J.A. 66. The court told petitioner that if he pleaded guilty, "there will probably be no appeal." J.A. 64. It explained that if he entered a guilty plea, he "would be generally giving up [his] rights to appeal," except "if [he] believe[d] that [his] guilty plea was somehow unlawful or involuntary or if there [were] some other fundamental defect in the[] guilty-plea proceedings." J.A. 63. It qualified that admonishment only by later adding that he "could also challenge [his] conviction based on newly discovered evidence or a claim of ineffective assistance of counsel." J.A. 64. It also subsequently described petitioner's written plea agreement as "giving up [his] right to appeal [his] conviction and challenge the sentence [the court] impose[d], unless the sentence exceeds the statutory maximum of the Guidelines Range or [he] claim[ed] newly discovered evidence or ineffective assistance of counsel." J.A. 76. Although that was not an accurate description of the plea agreement itself, which did not include a waiver of petitioner's right to appeal his conviction, it was congruent with the court's description of the default effect of his plea. At all relevant points, petitioner indicated that he understood the district court's warnings. See J.A. 63-64, 66, 77.

In the course of the colloquy, the district court identified no exception to the appeal bar that would allow for constitutional challenges to the statute of conviction. Petitioner now relies (Br. 45) on the exception for a claim

that the "guilty plea was somehow unlawful or involuntary or if there [were] some other fundamental defect in the[] guilty-plea proceedings," J.A. 63. But that exception expressly relates to claims of defects in the "proceedings," *ibid.*, not claims of defects in the substance of the charge. Only by narrowly focusing (Br. 45) on the first half of the sentence is petitioner able to suggest an interpretation under which *any* claim about the plea's "unlawful[ness]" would be allowed—an unreasonable interpretation that would swallow the rule that the court clearly announced.

Petitioner's pre-plea motions indicate that he was subjectively aware of the possibility of raising a substantive constitutional challenge to the statute under which he was charged. See pp. 4-5, *supra*. Yet at no point during the plea colloquy did he evince a belief that, notwithstanding his plea, he would be able to renew his constitutional claims on appeal, or to raise new ones (like his vagueness claim). Although petitioner notes (Br. 45) that "he was *pro se* when he pled guilty," his voluntary election to represent himself (with the assistance of standby counsel) does not negate the appeal limitations of which he was expressly informed. Cf. *Vonn*, 535 U.S. at 73 n.10 (defendant who chooses self-representation is held to plain-error review for failing to object to a Rule 11 error; "silence is one of the perils [the pro se defendant] assumes").

2. Petitioner contends (Br. 44-46) that the district court's warnings were so inadequate that his plea should be vacated on the ground that it was not knowing and intelligent. That contention was not raised in the petition, is outside the scope of the question presented, and accordingly does not provide a valid basis for disturbing the decision below. See, *e.g.*, *Wood* v. *Allen*, 558 U.S. 290,

304 (2010); *Yee* v. *City of Escondido*, 503 U.S. 519, 535-538 (1992); Sup. Ct. R. 14.1(a).

In any event, petitioner's argument is not only factually unsupported, for the reasons described above, but also legally untenable. Petitioner identifies no constitutional principle, statute, rule, or judicial decision that requires that a defendant be subjectively aware of every potential appellate claim he is relinquishing in order for his guilty plea to be valid. That would effectively add a new, onerous, and unwarranted requirement to the plea-colloquy warnings listed in Rule 11(b). It would also provide an end-around to the guilty-plea-preclusion doctrine by allowing a defendant with any claim—even a claim of a sort that this Court has already directly held to be precluded by entry of a guilty plea—to undo his plea by denying subjective awareness of that doctrine.

A defendant who pleads guilty under a misapprehension about his appeal rights could potentially try to establish that his counsel was constitutionally deficient in failing to advise him about the procedural consequences of the plea and that he would not have entered the plea but for the deficient advice. See *Hill*, 474 U.S. at 59-60. He cannot, however, claim that he was entitled to a specific warning or that his plea was not knowing and intelligent. See *Ruiz*, 536 U.S. at 630 (knowing and intelligent plea "does not require complete knowledge of the relevant circumstances" and can be entered "despite various forms of misapprehension under which a defendant might labor").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

FEDERAL APPELLATE DECISIONS EXPRESSLY NOTING THE PRESERVATION OF CONSTITUTIONAL CHALLENGES TO A STATUTE OF CONVICTION THROUGH A CONDITIONAL PLEA

1. *United States* v. *Taylor*, No. 16-2542, 2017 WL 2543376, at *1 (8th Cir. June 13, 2017) (as-applied Second Amendment challenge to 18 U.S.C. 922(g)(1)).

2. *United States* v. *Anderson*, 771 F.3d 1064, 1066 (8th Cir. 2014) (Commerce Clause challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 135 S. Ct. 1575 (2015).

3. *United States* v. *Cabrera-Gutierrez*, 756 F.3d 1125, 1128 (9th Cir.) (Commerce Clause challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 135 S. Ct. 124 (2014).

4. *United States* v. *Shill*, 740 F.3d 1347, 1349, 1351, 1355 (9th Cir.) (vagueness challenge to 18 U.S.C. 2422(b)), cert. denied, 135 S. Ct. 147 (2014).

5. *United States* v. *Chovan*, 735 F.3d 1127, 1129-1131 (9th Cir. 2013) (facial and as-applied Second Amendment challenges to 18 U.S.C. 922(g)(9)), cert. denied, 135 S. Ct. 187 (2014).

6. *United States* v. *Chapman*, 666 F.3d 220, 224 (4th Cir. 2012) (as-applied Second Amendment challenge to 18 U.S.C. 922(g)(8)).

7. *United States* v. *Staten*, 666 F.3d 154, 157 (4th Cir. 2011) (as-applied Second Amendment challenge to 18 U.S.C. 922(g)(9)), cert. denied, 566 U.S. 950 (2012).

8. *United States* v. *Lucas*, 419 Fed. Appx. 690, 690-691 (8th Cir. 2011) (per curiam) (Commerce Clause, due process, ex post facto, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), vacated, 565 U.S. 1189 (2012).

9. *United States* v. *Portillo-Munoz*, 643 F.3d 437, 439, 442 (5th Cir. 2011) (Second Amendment challenge to 18 U.S.C. 922(g)(5)), cert. denied, 566 U.S. 963 (2012).

10. *United States* v. *Lowe*, 416 Fed. Appx. 579, 579-580 (8th Cir. 2011) (per curiam) (Commerce Clause, Tenth Amendment, ex post facto, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

11. *United States* v. *Leach*, 639 F.3d 769, 771 (7th Cir. 2011) (ex post facto challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

12. *United States* v. *Booker*, 644 F.3d 12, 15, 22 (1st Cir. 2011) (facial Second Amendment challenge to 18 U.S.C. 922(g)(9)), cert. denied, 565 U.S. 1204 (2012).

13. *United States* v. *Walker*, 411 Fed. Appx. 947, 948 (8th Cir.) (per curiam) (Commerce Clause challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.* and 18 U.S.C. 2250), cert. denied, 565 U.S. 852 (2011).

14. *United States* v. *Curry*, 627 F.3d 312, 314 (8th Cir. 2010) (per curiam) (Commerce Clause, due process, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), vacated, 565 U.S. 1189 (2012).

15. *United States* v. *Fuller*, 627 F.3d 499, 500-502, 508 (2d Cir. 2010) (Commerce Clause, ex post facto, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), vacated, 565 U.S. 1189 (2012).

16. *United States* v. *Begay*, 622 F.3d 1187, 1192-1193, 1198 (9th Cir. 2010) (ex post facto and due process challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 564 U.S. 1023 (2011).

17. *United States* v. *Sanders*, 622 F.3d 779, 782 (7th Cir. 2010) (Commerce Clause challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 562 U.S. 1193 (2011).

18. *United States* v. *Huls*, 353 Fed. Appx. 176, 177 (10th Cir. 2009) (Commerce Clause, Tenth Amendment, and due process challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

19. *United States* v. *Zuniga*, 579 F.3d 845, 847-848 (8th Cir. 2009) (per curiam) (Commerce Clause, Tenth Amendment, ex post facto, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 560 U.S. 954 (2010).

20. *United States* v. *Whaley*, 577 F.3d 254, 256, 258, 261, 263 (5th Cir. 2009) (Commerce Clause, due process, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

21. *United States* v. *Ambert*, 561 F.3d 1202, 1204-1205, 1207-1210, 1212 (11th Cir. 2009) (Commerce Clause, ex post facto, due process, nondelegation, and right-to-travel challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

22. *United States* v. *Paull*, 551 F.3d 516, 519-520 (6th Cir.) (vagueness challenge to Child Pornography Protection Act, 18 U.S.C. 2252 *et seq.*), cert. denied, 558 U.S. 827 (2009).

23. *United States* v. *Hinckley*, 550 F.3d 926, 927-928 (10th Cir. 2008) (Commerce Clause, due process, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 556 U.S. 1240 (2009).

24. *United States* v. *Madera*, 528 F.3d 852, 854 (11th Cir. 2008) (per curiam) (Commerce Clause, ex post facto, due process, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

25. *United States* v. *Bly*, 510 F.3d 453, 455, 457 (4th Cir. 2007) (First Amendment challenge to prosecution under 18 U.S.C. 876(b) for particular statements).

26. *United States* v. *Latu*, 479 F.3d 1153, 1154-1155 (9th Cir.) (as-applied Commerce Clause challenge to 18 U.S.C. 922(g)(5)), cert. denied, 552 U.S. 868 (2007).

27. *United States* v. *Earle*, 216 Fed. Appx. 824, 824-825 (10th Cir. 2007) (as-applied Commerce Clause challenge to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*).

28. *United States* v. *Cramer*, 213 Fed. Appx. 138, 139-140 (3d Cir.) (as-applied Commerce Clause challenge to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*), cert. denied, 550 U.S. 949 (2007).

29. *United States* v. *Wingfield*, 206 Fed. Appx. 208, 209-210 (3d Cir. 2006) (facial Commerce Clause challenge to 18 U.S.C. 922(g)), cert. denied, 550 U.S. 970 (2007).

30. *United States* v. *Pountney*, 191 Fed. Appx. 679, 680-681 (10th Cir. 2006) (facial and as-applied Commerce Clause challenges to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*).

31. *United States* v. *Sullivan*, 451 F.3d 884, 886 (D.C. Cir. 2006) (as-applied Commerce Clause challenge to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2252A(a)(5)(B)).

32. *United States* v. *Patton*, 451 F.3d 615, 619-620 (10th Cir. 2006) (Commerce Clause and due process challenges to 18 U.S.C. 931), cert. denied, 549 U.S. 1213 (2007).

33. *United States* v. *Grimmett*, 439 F.3d 1263, 1266-1267, 1271 (10th Cir. 2006) (facial and as-applied Commerce Clause challenges to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*).

34. *United States* v. *Wilson*, 118 Fed. Appx. 974, 975 (7th Cir. 2004) (Commerce Clause, Tenth Amendment, and equal-protection challenges to 18 U.S.C. 922(g)(1)), cert. denied, 545 U.S. 1122 (2005).

35. *United States* v. *Bredimus*, 352 F.3d 200, 203 & n.4, 208 (5th Cir. 2003) (Commerce Clause, First Amendment, Fifth Amendment, and Eighth Amendment challenges to 18 U.S.C. 2423(b)), cert. denied, 541 U.S. 1044 (2004).

36. *United States* v. *Bournes*, 339 F.3d 396, 396 (6th Cir. 2003) (Second Amendment and due process challenges to 26 U.S.C. 5861(d) and 18 U.S.C. 922(*o*)), cert. denied, 540 U.S. 1113 (2004).

37. *United States* v. *Moreno-Morillo*, 334 F.3d 819, 824-826 (9th Cir. 2003) (Commerce Clause challenge to the Maritime Drug Law Enforcement Act, Pub. L. No. 96-350, 94 Stat. 1159), cert. denied, 540 U.S. 1156 (2004).

38. *United States* v. *Pritchett*, 327 F.3d 1183, 1184-1185 (11th Cir.) (Commerce Clause challenge to 18 U.S.C. 922(j)), cert. denied, 540 U.S. 893 (2003).

39. *United States* v. *McCoy*, 323 F.3d 1114, 1115 (9th Cir. 2003) (as-applied Commerce Clause challenge to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*).

40. *United States* v. *Ballinger*, 312 F.3d 1264, 1265-1266, 1268 (11th Cir. 2002) (facial and as-applied Commerce Clause challenges to 18 U.S.C. 247), rev'd on reh'g en banc, 395 F.3d 1218 (11th Cir.), cert. denied, 546 U.S. 829 (2005).

41. *United States* v. *Lemons*, 302 F.3d 769, 770 (7th Cir.) (Commerce Clause challenge to 18 U.S.C. 922(g)(1)), cert. denied, 537 U.S. 1049 (2002).

42. *United States* v. *Warren*, 51 Fed. Appx. 843, 844 (10th Cir. 2002) (Commerce Clause challenge to 18 U.S.C. 922(g)(1)).

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45. *United States* v. *Spruill*, 292 F.3d 207, 208, 211-212, 215 (5th Cir. 2002) (Second Amendment and Fifth Amendment challenges to 18 U.S.C. 922(g)(8)).

46. *United States* v. *Napier*, 233 F.3d 394, 396-397 (6th Cir. 2000) (Commerce Clause, Second Amendment, and Fifth Amendment challenges to 18 U.S.C. 922(g)(8)).

47. *United States* v. *Matthews*, 209 F.3d 338, 341 (4th Cir.) (as-applied First Amendment and facial due process challenges to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*, cert. denied, 531 U.S. 910 (2000).

48. *United States* v. *Kovach*, 208 F.3d 1215, 1216 (10th Cir. 2000) (Commerce Clause challenge to 18 U.S.C. 513(a)).

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50. *United States* v. *Lue*, 134 F.3d 79, 80-81 (2d Cir. 1998) (Article I, Tenth Amendment, and equal protection challenges to the Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. 1203).

51. *United States* v. *Hampshire*, 95 F.3d 999, 1001 (10th Cir. 1996) (Commerce Clause and Tenth Amendment challenges to the Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403), cert. denied, 519 U.S. 1084 (1997).

52. *United States* v. *Wall*, 92 F.3d 1444, 1445-1446 (6th Cir. 1996) (Commerce Clause challenge to 18 U.S.C. 1955), cert. denied, 519 U.S. 1059 (1997).

53. *United States* v. *Kirk*, 70 F.3d 791, 793 (5th Cir. 1995) (Commerce Clause challenge to 18 U.S.C. 922(*o*)), cert. denied, 522 U.S. 808 (1997).

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Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

The government acknowledges that in *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), this Court identified certain "types of claims . . . as exceptions to the general preclusive effect of a guilty plea." Resp. Br. 13. The government's attempt to distinguish the claims at issue in *Blackledge* and *Menna* from a claim that the statute of conviction is unconstitutional rests on an unprincipled, unpersuasive, and unworkable distinction between challenges to the filing of charges and challenges to the ultimate conviction. Under the government's theory, the "*Menna-Blackledge* doctrine" recognized by the drafters of Federal Rule of Criminal Procedure 11(a)(2), this Court, and numerous lower courts, is no doctrine at all, but is instead largely limited to the facts of *Blackledge* and *Menna*. That position should be rejected. As Petitioner explained in the opening brief, a constitutional challenge to the statute of conviction attacks the State's very power to obtain or sustain a conviction. It is thus indistinguishable from the claims at issue in *Blackledge* and *Menna*.

The government's insistence that a conditional plea under Rule 11(a)(2) is the "exclusive" method to preserve constitutional claims for appeal is incompatible with its simultaneous recognition of the *Blackledge/Menna* "exception" to that Rule. Resp. Br. 11, 13. The Advisory Committee Note to Rule 11(a)(2) explicitly states that any case falling within the "*Menna-Blackledge* doctrine" is exempt from the Rule's conditional plea procedures, and the "doctrine" at that time included constitutional challenges to the statute of

conviction, as evidenced by the authorities cited in the Note. Those authorities described constitutional challenges to the statute of conviction as "jurisdictional" in nature, which renders irrelevant the government's reliance on the Note's reference to guilty pleas as waiving all "nonjurisdictional defects."

Though the government argues that "interests in efficiency, finality, and clarity" would be undermined by Petitioner's reading of Rule 11(a)(2), Resp. Br. 30, Petitioner's proposed default rule answers all of those concerns. Under that rule, rather than require a defendant to obtain the government's and the court's consent to enter a conditional plea explicitly preserving the right to appeal a constitutional challenge to the statute of conviction, this Court instead should require the government to obtain the defendant's consent via an explicit waiver of his challenge in a plea agreement. Such a rule takes account of the practical considerations that inform plea bargaining. Applying that rule to this case, Petitioner prevails, as the government concedes it did not obtain any written waiver from Petitioner.

In the alternative, this Court should remand for the D.C. Circuit to consider whether Petitioner's plea was voluntary, knowing, and intelligent given the district court's representations in the plea colloquy regarding Petitioner's appellate rights.

ARGUMENT

I. A Guilty Plea Does Not Inherently Waive The Right To Challenge The Constitutionality Of The Statute Of Conviction.

The government does not dispute that plea bargains "are essentially contracts," and that plea agreements should be interpreted in accordance with contract principles. Pet'r's Br. 18 (quoting *Puckett v. United States*, 556 U.S. 129, 137 (2009)). The government also concedes that, in his written plea agreement, Petitioner waived neither the right to appeal his conviction nor the right to challenge the constitutionality of his statute of conviction. Resp. Br. 48-49. Ordinarily, that would be the end of the matter because, under basic principles of contract law, parties cannot be held to a term to which they did not agree. The government, however, argues that even in the absence of any explicit waiver, Petitioner nonetheless relinquished his right to file an appeal challenging the constitutionality of his statute of conviction simply because he pled guilty. That argument is supported by neither law nor logic.

A. This Court Should Not Abandon Its Principled Approach For Determining Which Claims Are Preserved Post-Plea In Favor Of The Government's Unprincipled Approach.

As the government concedes, in *Blackledge* and *Menna* this Court recognized a category of constitutional claims that can be raised on appeal even after a plea of guilty. Resp. Br. 39-40. This Court established a principled standard for determining which "kinds of constitutional objections" fall within this

"*Menna-Blackledge* doctrine." Fed. R. Crim. P. 11 advisory committee's note to 1983 amendments. Pursuant to that standard, a defendant preserves claims that go to the State's very power to prosecute the defendant for the crime alleged. Conversely, a defendant is foreclosed from pursuing procedural and evidentiary claims that are rendered irrelevant by the admissions the defendant makes when pleading guilty. Pet'r's Br. 20-25.

The government rejects this Court's straightforward standard, instead inventing a new test under which a defendant preserves claims only when "the relevant constitutional violation [is] the filing of the charges," and forfeits claims when the relevant violation is "the entry of a conviction." Resp. Br. 39, 41. The government characterizes the former as "a right to avoid having to plead at all." *Id.* 44. The government's distinction is inconsistent with the nature of the claims at issue in *Blackledge* and *Menna*, unmoored from this Court's precedent, and unworkable.

1. The government's charges/conviction distinction cannot be squared with *Blackledge* and *Menna* themselves. The government does not dispute that in both *Blackledge* and *Menna*, the defendants had no "right to avoid having to plead at all." Resp. Br. 44. Instead, they were required to enter pleas, and then litigate their constitutional claims all the way to this Court. Pet'r's Br. 41. Exactly like Petitioner here, the defendant in *Menna* moved to dismiss his indictment and failed; elected to plead guilty rather than go to trial; and then appealed his conviction, claiming that the State could not constitutionally prosecute him for the offense

of which he had been convicted. 423 U.S. at 61-62. There is no meaningful distinction between these cases.

In drawing its charges/conviction distinction, the government relies primarily on *Blackledge*'s statement that the right at stake is the "right not to be haled into court at all." 474 U.S. at 30. But this Court has cautioned that a defendant advancing a prosecutorial vindictiveness challenge does not literally have a "right not to be haled into court at all"—he has no "right not to be tried"—and so, as the government admits, must await his conviction before pursuing an appeal. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 268-69 (1982); Resp. Br. 41.

Nor does the government's distinction cohere with the nature of double jeopardy violations. "[T]he lynchpin for all double jeopardy jurisprudence" is that jeopardy does not attach until the jury is actually empaneled and sworn (or, in non-jury cases, until the first witness is sworn), meaning that the "very act of haling" the defendant into court does not "complete[] the constitutional violation," as the government argues (Resp. Br. 41 (quotation marks omitted)). *See Crist v. Bretz*, 437 U.S. 28, 37-38 & n.15 (1978); *Martinez v. Illinois*, 134 S. Ct. 2070, 2072 (2014).

The government's charges/conviction distinction thus cannot explain *Blackledge* and *Menna* themselves, where the relevant constitutional violations were not limited to the "filing of the charges" and did not provide defendants with a "right to avoid having to plead at all." Resp. Br. 39, 44.

2. The government's charges/conviction distinction likewise cannot explain this Court's other relevant precedents. Under the government's view that the *Blackledge/Menna* doctrine is limited to cases where the "relevant constitutional violation [is] the filing of the charges that forced the defendant to enter a plea," Resp. Br. 39, several of this Court's cases should have come out differently. For example, in *Tollett v. Henderson*, 411 U.S. 258 (1973), this Court held that the defendant's guilty plea precluded him from challenging his indictment on the ground that the grand jury was unconstitutionally selected on the basis of race. *Id.* at 266. Under the government's test, such a challenge should have been deemed preserved post-plea because "[t]he claim[] at issue" challenged the grand jury's "act of filing the charges," rather than the ultimate conviction. Resp. Br. 41; *Blackledge*, 417 U.S. at 30 (characterizing the defect in *Tollett* as a "tainted indictment").

Similarly, the government's theory cannot explain why the Court reached opposite outcomes in *Menna* and *United States v. Broce*, 488 U.S. 563 (1989). Both featured post-plea double jeopardy challenges to indictments, but only *Menna* held the challenge was preserved post-plea. Addressing *Menna*, the government asserts that a double jeopardy claim is preserved post-plea because it "is so intrinsically directed at the very authority of the Government to hale [the defendant] into court." Resp. Br. 41 (alteration in original) (internal quotation marks omitted). But if this explanation held water, *Broce*'s double jeopardy claim –

which could be described just this way – would not have been foreclosed. 488 U.S. at 576.

In contrast to the government's tortured reading of *Blackledge* and *Menna*, Petitioner's interpretation easily explains these outcomes. In *Tollett*, the unconstitutional method of selecting grand jurors was a procedural violation and therefore curable with "a new indictment by a properly selected grand jury." Pet'r's Br. 22-23 (quoting *Blackledge*, 417 U.S. at 30). The defendant accordingly could not challenge the violation post-plea because it did not "go to the very power of the State to bring the prosecution," and so a successful claim would not have the practical result of "prevent[ing] a trial from taking place at all." *Id.* at 23 (brackets in original) (internal quotation marks omitted).

And, unlike the defendant in *Menna*, the defendants in *Broce* could prove their double jeopardy claims only by contradicting their admissions in the indictments to which they pled guilty. *Id.* at 24-25. The claims accordingly were barred by the principle of *Tollett* and the *Brady* trilogy that "prohibits further inquiry into constitutional violations that become irrelevant" because they are inconsistent with a defendant's admissions of guilt. *Id.* at 25.[1]

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[1] The government points to *Brady v. United States*, 397 U.S. 742 (1970), as the case that proves its rule because the Court foreclosed a post-plea challenge even though the relevant defect could only be cured through "judicial invalidation" of an unlawful statutory provision. Resp. Br. 46-47. The government misunderstands the relevant standard. A violation is curable if a defendant could have been convicted of the same substantive crime (or given the same punishment for that crime) had different procedures or evidentiary

3. The government's charges/conviction distinction is also unworkable in practice because a constitutional challenge to the statute of conviction can be—and often is—conceived of as a challenge to the initiation of proceedings. Courts regularly characterize constitutional challenges to the statute of conviction as challenges to the "outset" of the proceedings rather than merely attacks on the conviction itself. *See, e.g.*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 730-31 (2016) (when "laws are unconstitutional and void, the Circuit Court acquired no jurisdiction over the causes" (quoting *Ex Parte Siebold*, 100 U.S. 371, 376-77 (1880))); *Vill. of Maineville v. Hamilton Twp. Bd. of Trs.*, 726 F.3d 762, 766 (6th Cir. 2013) (Sutton, J.) (noting that an "unconstitutional application of a statute" and a "statute that is unconstitutional in all of its applications" are both "void from the outset"); *Alexander v. Cockrell*, 294 F.3d 626, 630 (5th Cir. 2002) ("An unconstitutional statute is void *ab initio*, having no effect, as though it had never been passed."). This makes sense given that "only Congress, and not the courts, . . . can make conduct criminal." *Bousley v. United States*, 523 U.S. 614, 620-21

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rules been employed. *See Blackledge*, 417 U.S. at 30; Pet'r's Br. 23-24 n.3. In *Brady*, the defect inhered in the procedural aspect of the statutory scheme—that only by forgoing a guilty plea and proceeding with trial could a defendant face the death penalty. *Brady*, 397 U.S. at 745-46. This defect could have been cured by altering that procedural aspect, such as by allowing for capital punishment for those who pled guilty as well as those who opted for trial. *See United States v. Jackson*, 390 U.S. 570, 575-81 (1968). *Brady* is thus wholly consistent with the "curable" approach explained in *Blackledge*.

(1998). Even applying the government's standard, then, a constitutional challenge to a criminal statute is, at least in part, an attack on the initiation of proceedings.

4. The government also relies on the "presumption that a statute is constitutional" to argue that a defendant challenging the constitutionality of a statute on appeal is not challenging the "initiation of the prosecution." Resp. Br. 41. But that principle cannot distinguish constitutional challenges from double jeopardy and prosecutorial vindictiveness claims. There is also, after all, "a well-accepted principle that grand jury indictments are presumed valid." *United States v. Overmyer*, 899 F.2d 457, 465 (6th Cir. 1990); *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999); *see also Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) ("Only a defect so fundamental that it causes . . . the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried."). And, when a defendant alleges vindictive prosecution before trial, an additional presumption attaches "to the initiation of the prosecution": "[A] prosecutor's pretrial decisions, including the choice to seek increased or additional charges, are presumed valid." *United States v. Falcon*, 347 F.3d 1000, 1004-05 (7th Cir. 2005) (quoting *United States v. Goodwin*, 457 U.S. 368, 382 (1982)). Thus, the government cannot distinguish *Blackledge* and *Menna* on the ground that no presumptive validity accompanies prosecutions susceptible to double jeopardy or prosecutorial vindictiveness claims.

B. The Government's Attempts To Undermine Petitioner's Interpretation Of *Blackledge* and *Menna* Are Unavailing.

In addition to introducing a baseless new distinction, the government makes various other arguments in an attempt to undercut the straightforward logic of Petitioner's position that a constitutional challenge to the statute of conviction falls within the *Blackledge/Menna* doctrine. None have merit.

1. The government erroneously states, without citation, that by admitting guilt, a defendant "necessarily concedes that the conviction is not barred by then-applicable law." Resp. Br. 36; *see also id.* at 33-34. The government reaches this conclusion by misreading *Libretti v. United States*, 516 U.S. 29 (1995), and *Broce*. Both cases provide that, by pleading guilty, a defendant "admit[s] guilt of a substantive crime." *Broce*, 488 U.S. at 570; *Libretti*, 516 U.S. at 38 (citing *Broce*). But admitting guilt of a "substantive crime," as this Court normally uses that term, simply means admitting guilt of a crime that has been defined by the legislature. *See, e.g., Pinkerton v. United States*, 328 U.S. 640, 643-44 (1946) (defining what constitutes a "substantive" crime). It does not mean that the defendant agrees that the legislature can constitutionally criminalize that conduct. Reading either case for that proposition would be odd given that

neither case involved a constitutional challenge to the statute of conviction.[2]

To be sure, *Broce* notes that a guilty plea generally results in a "binding, final judgment of guilt." 488 U.S. at 569. But the defendants in *Blackledge* and *Menna* likewise had binding, final judgments of guilt until those judgments were overturned as unconstitutional. *Broce* simply reaffirms the validity of *Blackledge* and *Menna* as "[a]n exception to the rule barring collateral attack on a guilty plea," *id.* at 574, and the question before this Court is whether a challenge to the constitutionality of the statute of conviction falls within that exception. As discussed *supra* and in the opening brief, the analysis of the underlying claim in *Broce* provides further support for answering that question in the affirmative. Pet'r's Br. 24-25.

2. That question is also answered in the affirmative by *Haynes v. United States*, 390 U.S. 85 (1968), in which this Court found it obvious that "of course" a defendant's plea of guilty did not waive his right to bring a post-plea constitutional challenge to his statute of conviction. 390 U.S. at 87 n.2. The government attempts to explain *Haynes* by suggesting that perhaps the preclusive effect of guilty pleas was not well established when *Haynes* was decided, Resp. Br. 48, but that is not true, *see, e.g.*, 2 Lester B. Orfield, *Criminal Procedure Under the Federal Rules* § 11:13 (1966); *Hughes v. United States*, 371 F.2d 694, 696 (3d Cir. 1967); *Briley v. Wilson*, 376

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[2] The same is true of *North Carolina v. Alford*, 400 U.S. 25 (1970), and *Boykin v. Alabama*, 395 U.S. 238 (1969), also relied on by the government. Resp. Br. 45.

F.2d 802, 802-03 (9th Cir. 1967) (per curiam); *United States ex rel. Glenn v. McMann*, 349 F.2d 1018, 1019 (2d Cir. 1965); *Marchibroda v. United States*, 368 U.S. 487, 493 (1962). Indeed, as Petitioner already noted, the Fifth Circuit decision before the Court in *Haynes* observed that a guilty plea is generally "a waiver of all nonjurisdictional defects and defenses." Pet'r's Br. 27-28; *see infra* Part II.A (discussing use of the term "nonjurisdictional").

3. The government's reliance on a footnote from a two-Justice dissent in *Ellis v. Dyson*, 421 U.S. 426 (1975), Resp. Br. 43, does not change the analysis. *Ellis* featured a defendant who pled *nolo contendere* to a criminal charge but later sought to expunge the conviction by way of a § 1983 action on the ground that the statute of conviction was unconstitutional. 421 U.S. at 429-30. The *Ellis* majority outlined thorny standing and abstention questions for the district court to address on remand and, despite the dissent, did not opine on whether the petitioner could pursue his constitutional challenge given his plea. *Id.* at 434-35. *Ellis* is thus consistent with *Haynes*, as the Court refrained from treating the guilty plea as a hurdle to relief.

Moreover, both *Menna* and *Haring v. Prosise*, 462 U.S. 306 (1983), were issued after *Ellis* and reaffirmed that defendants are not precluded from raising post-plea a claim where "judged on its face the charge is one which the State may not constitutionally prosecute" because, in such a circumstance, "the State may not convict" the defendant "no matter how validly his factual guilt is established." *Menna*, 423 U.S. at 62 n.2; *Haring*, 462

U.S. at 321 (endorsing and applying *Menna* standard). Neither case adopted the view of the *Ellis* dissenters.

C. Petitioner's Retroactivity Analogy Is Sound.

The government misapprehends Petitioner's analogy to this Court's retroactivity jurisprudence. Petitioner is not wielding retroactivity doctrine as a tool for defying "normal litigation standards," as the government asserts. Resp. Br. 18-19. Petitioner is merely recognizing that the retroactivity standard for substantive rules "echoes" the standard for *Blackledge/Menna* claims, and that by the same logic, the *Blackledge/Menna* standard enables post-plea challenges to the statute of conviction. Pet'r's Br. 32. The government's insistence that the analogy is inapt because retroactivity arises only following a "definitively established" rule is unavailing. Resp. Br. 18. Just as neither a double jeopardy nor a vindictive prosecution violation need be "definitively established" for a defendant to pursue such a claim post-plea pursuant to *Blackledge/Menna*, neither does a constitutional challenge to the statute of conviction.

The government's attempts to reassure the Court that defendants will not be put in an impermissible Catch-22, in which they can never challenge the constitutionality of their statutes of conviction, on direct or collateral review, are likewise unpersuasive. Pet'r's Br. 34-35; Resp. Br. 19-21. Despite the government's suggestion to the contrary, Resp. Br. 20, courts regularly hold that defendants cannot get the benefit of retroactive new rules on collateral review where, as in Petitioner's case, the plea agreement explicitly waives the defendant's right to seek collateral review, J.A. 41;

see, e.g., *United States v. Frazier-LeFear*, 665 F. App'x 727, 731 (10th Cir. 2016); *Sanford v. United States*, 841 F.3d 578, 580-81 (2d Cir. 2016); *Crawford v. United States*, 501 F. App'x 943, 945 (11th Cir. 2012); Brian R. Means, *Federal Habeas Manual* § 1:63, Westlaw (database updated May 2017) (noting that federal circuits do not view a "post-plea change in the law favorable to the defendant" as significant to collateral waiver in plea agreements). And even where a plea agreement does not explicitly waive collateral review, the government's suggestion does nothing to address the injustice of requiring a defendant convicted under an unconstitutional statute to languish in the criminal justice system while awaiting a successful challenge to the statute mounted elsewhere.

The government claims that defendants might also be able to benefit from a substantive new rule holding that a statute of conviction is unconstitutional by claiming "actual innocence" to overcome procedural default. Resp. Br. 20. But it is unsettled whether "actual innocence" applies when a statute, after a change in law, no longer validly criminalizes the conduct that served as the basis of a conviction, or no longer validly authorizes the defendant's sentence. *See, e.g.*, *United States v. McIntosh*, 676 F. App'x 792, 795 (10th Cir. 2017); *Phillips v. United States*, 734 F.3d 573, 581-82 (6th Cir. 2013). And despite what the government says here, in other cases it has argued that a defendant cannot claim "actual innocence" in such circumstances. *See, e.g.*, Br. of United States at 34, *United States v. Lee*, 855 F.3d 244 (4th Cir. 2015) (No. 15-6099), 2015 WL 9412180; Reply Br. of United States at 16-18, *United States v. Pettiford*,

612 F.3d 270 (4th Cir. 2010) (No. 09-4119), 2009 WL 4883833.

With respect to the procedural bar for habeas petitioners who have not raised their constitutional challenges to the statute of conviction on direct appeal, the best the government can offer is leaving such petitioners "at the mercy of *noblesse oblige*," *United States v. Stevens*, 559 U.S. 460, 480 (2010), assuring the Court that the government "has the ability" to waive the procedural bar if it believes "defendants have meritorious substantive claims." Resp. Br. 20. In other words, the government asks the Court to trust prosecutors to sort good claims from bad claims and act in defendants' best interests. But "[a]s a general rule, one should not trust a prosecutor who says, 'Trust me.'" Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 Albany L. Rev. 919, 935 (2015/2016).[3] When there is a possibility that a defendant has been convicted for something that is not a crime, the stakes are too high.

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[3] The government claims that it is currently waiving the procedural bar for defendants sentenced with the statutory enhancement held unconstitutional in *Johnson v. United States*, 135 S. Ct. 2251 (2015). Resp. Br. 20-21. But even as to this, the government has been criticized for not "tak[ing] a consistent position." *Duhart v. United States*, No. 0:16-cv-61499-KAM, 2016 WL 4720424, at *3 n.6 (S.D. Fla. Sept. 9, 2016), *appeal docketed*, No. 17-11476 (11th Cir. Apr. 3, 2017).

II. Petitioner Was Not Required To Enter A Conditional Plea Under Rule 11(a)(2) To Preserve His Constitutional Challenges.

Despite its acknowledgement of the *Blackledge/Menna* "exception" to the preclusive effect of guilty pleas, the government argues that Rule 11(a)(2) provides the "*exclusive* procedure for preserving a constitutional challenge to a federal criminal statue to which a defendant pleads guilty." Resp. Br. 11 (emphasis added). But as the relevant Advisory Committee Note indicates, the Rule exempts the "*Menna-Blackledge* doctrine" from its reach. And that doctrine plainly includes more than just *Blackledge* and *Menna* themselves. The government's reliance on the Advisory Note's reference to guilty pleas waiving "nonjurisdictional defects" is misplaced given that the authorities otherwise cited in the Note specifically referred to constitutional challenges to the statute of conviction as "jurisdictional."

While the government argues that Petitioner's position would undermine "interests in efficiency, finality, and clarity," Resp. Br. 30, the government overlooks a rather obvious solution to its problem—requiring the government to obtain consent and an explicit waiver of rights from the defendant, rather than requiring the defendant to obtain consent and an explicit preservation of rights from the government and the court.

A. The Advisory Committee Note Supports Petitioner's Position That A Constitutional Challenge To The Statute Of Conviction Is Not Subject To Rule 11(a)(2).

When conditional pleas were first authorized by Rule 11(a)(2) in 1983, the Advisory Committee explicitly recognized this Court's holding "that certain kinds of constitutional objections may be raised after a plea of guilty." Fed. R. Crim. P. 11 advisory committee's note to 1983 amendments. Citing *Blackledge* and *Menna*, the Advisory Committee stated that the conditional plea procedures prescribed by the Rule were to have "no application to such situations, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application." *Id.*

Skipping over any explanation of what the Advisory Committee meant by its reference to the "*Menna-Blackledge* doctrine," the government instead stresses language elsewhere in the Advisory Note stating that "the availability of a conditional plea under specified circumstances will aid in clarifying the fact that traditional, unqualified pleas do constitute a waiver of nonjurisdictional defects." *Id.* The government insists that the Committee intended to use the "standard definition of 'jurisdictional,'" Resp. Br. 26, which could not have included constitutional challenges to the statute of conviction given that in *United States v. Williams*, 341 U.S. 58 (1951), this Court had already decided that such challenges were "nonjurisdictional," Resp. Br. 28.

The authorities relied on by the Committee indicate otherwise. The only authority the Advisory Note quoted at length treated *Blackledge*, *Menna*, *and* challenges to the statute of conviction as "jurisdictional." *See* Comment, *Conditioned Guilty Pleas: Post-Guilty Plea Appeal of Nonjurisdictional Issues*, 26 UCLA L. Rev. 360, 360 n.1 (1978) ("Unqualified guilty pleas do not preclude review of jurisdictional defects . . . . For example, the defendant may challenge the conviction where . . . the statute under which the prosecution is brought is unconstitutional . . . ."). In fact, *all* of the sources cited in the Advisory Note that discuss what constitutes a "jurisdictional" challenge characterize a challenge to the statute of conviction as raising a "jurisdictional" defect, *see id.*; *United States v. Cox*, 464 F.2d 937, 940 (6th Cir. 1972); *United States v. Sepe*, 474 F.2d 784, 788 (5th Cir. 1973), or argue that "jurisdictional" is so broad that it should encompass even post-plea Fourth Amendment claims, *see* John Bernard Mullady, *Appellate Review of Constitutional Infirmities Notwithstanding a Plea of Guilty*, 9 Hous. L. Rev. 305, 313-15 (1971).

Indeed, in the *Cox* case cited by the Advisory Committee, the court went so far as to state that the "jurisdictional exception to the general rule [about the preclusive effect of a guilty plea] *has been limited to cases in which the accused is challenging the constitutionality of the statute*, usually on Fifth Amendment grounds, under which he is charged." 464 F.2d at 940 (emphasis added). In support of that statement, the Sixth Circuit cited this Court's decision in *Haynes*. *See id.* *Cox* also quoted a leading treatise at

the time as stating: "A defendant who has pleaded guilty is not barred from claiming . . . that the statute under which he was charged is unconstitutional. . . . The plea of guilty does waive, however, all nonjurisdictional defects in the proceeding." *Id.* (emphasis omitted) (quoting 1 Wright, *Federal Practice and Procedure: Criminal* § 175b) (citing multiple cases for this proposition).

The Committee did not cite or otherwise refer to this Court's decision in *Williams*, and from the authorities it did cite, it appears that the Committee at the time was using "[non]jurisdictional" in a "less than meticulous" manner, *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004); Pet'r's Br. 39, giving it a meaning far broader than "the courts' statutory or constitutional power to adjudicate the case," *United States v. Cotton*, 535 U.S. 625, 630 (2002) (emphasis omitted); Resp. Br. 16.[4]

B. Petitioner's Proposed Default Rule Fully Addresses The Government's Finality, Efficiency, And Clarity Concerns.

The government argues that if defendants are not required to preserve constitutional challenges to the statute of conviction under the conditional plea procedures of Rule 11(a)(2), this would destroy the finality of pleas, produce inefficiency, and create costly ambiguity. Resp. Br. 30-31. None of these concerns should give this Court any pause about adopting the

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[4] Even if the Committee were using "nonjurisdictional" in the manner the government claims, the Committee separately exempted claims under the "*Menna-Blackledge* doctrine" from the general bar on nonjurisdictional claims. Pet'r's Br. 39 n.5.

default rule Petitioner advocates. *First*, where the conviction or sentence is not authorized by law, "finality interests are at their weakest," *Welch v. United States*, 136 S. Ct. 1257, 1266 (2016), because there is "little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose," *id.* (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (opinion of Harlan, J.)); *see also* Pet'r's Br. 32-33.

Second, the government's concerns about inefficiencies are premised on its assumption that constitutional challenges to a statute of conviction will demand additional factual development or will not prove dispositive. Resp. Br. 31-32. But that is not the rule Petitioner advocates and is not consistent with this Court's precedent: Challenges with the former attribute do not fall within the *Blackledge/Menna* exception under *Broce*, Pet'r's Br. 43 (citing *Broce*, 488 U.S. at 569), and challenges with the latter attribute would not go to the very power of the government to prosecute the case.

Third, as to the concern that the government will not "know[] exactly what it gets for its concessions in the plea agreement," Resp. Br. 30, there is an easy solution. The government should be required to obtain an explicit waiver of a defendant's rights in the plea agreement rather than requiring the defendant to explicitly preserve them. In fact, the government has noted that many federal plea agreements already contain explicit waivers that "independently bar a challenge to the statute of conviction on appeal." BIO 17.

C. Practical Considerations Weigh In Favor Of Adopting Petitioner's Proposed Default Rule.

In the realm of criminal procedure, this Court has acknowledged that practical considerations inform its determinations. *See Lafler v. Cooper*, 566 U.S. 156, 169-70 (2012) (rejecting an argument that "ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials"); *Missouri v. Frye*, 566 U.S. 133, 143-44 (2012) ("Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop . . . ." (quoting *Lafler*, 566 U.S. at 170)). Since the Court is asked here to determine a default rule around which defendants and the government will bargain in the future, the Court's choice is in part one about which side should bear that default rule's burden. Practical considerations favor placing the burden on the government.

The cost to a defendant who mistakenly forfeits his right to challenge the constitutionality of the statute of conviction is great. As this Court established over 135 years ago and reaffirmed just last year, "[a]n unconstitutional law is void, and is as no law." *Montgomery*, 136 S. Ct. at 731 (alteration in original). Thus, a default rule that burdens defendants may punish some people who have committed no crimes. These high stakes alone are a "practical justification for singling out th[e]se cases as ones in which" placing the burden of "the consent requirement" on the defendant "would be problematic." Resp. Br. 32.

As *amici* point out, the pressures criminal defendants face to plead are immense, while the

resources they and their attorneys have access to are often sparse. *See* NACDL Amicus Br. 6-10; Innocence Project Amicus Br. 6-15. It is not sufficient to point to the hypothetical possibility of habeas relief as a backstop in the event a defendant forfeits his constitutional challenge because of his ignorance of the default rule. Even a later decision holding that the defendant's statute of conviction *is*, in fact, unconstitutional, is no guaranteed panacea, given the many procedural obstacles to seeking habeas relief. *See* 28 U.S.C. § 2255(f), (h) (one-year limitations period and restrictions on subsequent or successive petitions); *supra* (discussing collateral review waivers and the habeas procedural bar).

It does not matter that the government has refrained from "*habitually* withhold[ing] consent for conditional pleas," Resp. Br. 32 (emphasis added), and that it can come up with 56 examples of cases in which consent was granted. The government certainly does not grant consent in all cases, *see, e.g.*, *United States v. Vukasinovic*, 220 F. App'x 612, 614 (9th Cir. 2007), nor does it have any obligation to do so. Given the government's view that Petitioner's Second Amendment claim is "insubstantial" and that his vagueness claim was "forfeited," BIO 15-16, it is unclear whether the government even would have consented to a conditional plea in this case.[6]

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[6] The merits of Petitioner's constitutional claims are not before this Court, but contrary to the government's view, they are neither insubstantial nor forfeited. *See* D.C. Cir. Reply Br. 15-29.

Moreover, even if current government policy is not to "habitually" withhold consent, government policy can change. *Compare, e.g.*, Memorandum from Eric Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors (May 19, 2010) (directing federal prosecutors to make charging decisions "in the context of 'an individualized assessment [of the case]'"), *with* Memorandum from Jefferson Sessions, Att'y Gen., U.S. Dep't of Justice, for All Federal Prosecutors (May 10, 2017) (directing federal prosecutors to "charge and pursue the most serious, readily provable offenses" in every case). And in any event, tremendous discretion is left to individual prosecutors. The government's exhortation to trust its *noblesse oblige* is not enough.

III. In The Alternative, The District Court's Misrepresentation Of The Default Effect Of Petitioner's Plea Requires Remand To Determine Whether Petitioner's Plea Was Voluntary, Knowing, And Intelligent.

The government misapprehends the nature of Petitioner's alternative argument that this Court should remand for a determination concerning whether the plea was voluntary, knowing, and intelligent. Pet'r's Br. 44-46. Petitioner's claim derives not from a subjective misunderstanding on his part, but from the district court's misrepresentation regarding the default effect of a guilty plea.

This Court has repeatedly recognized that a court's misrepresentation can prevent a guilty plea from being voluntary, knowing, and intelligent. *Brady v. United States*, 397 U.S. 742, 755 (1970); *Bousley*, 523 U.S. at 618-19. Following this Court's lead, many circuits have ruled

that when a court misrepresents the effect of a guilty plea, the defendant must be afforded the opportunity to withdraw the plea. *See, e.g.*, *United States v. Cortez*, 973 F.2d 764, 767-69 (9th Cir. 1992); *United States v. Bundy*, 392 F.3d 641, 649 (4th Cir. 2004).[6] If the Court holds that Petitioner cannot appeal to challenge the constitutionality of the statute under which he was convicted, then the district court misrepresented the default effect of Petitioner's guilty plea when it told Petitioner that he could "appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." J.A. 63.

Contrary to the government's suggestion, Resp. Br. 50-51, this Court often remands for lower courts to address questions that arise from the Court's resolution of the question presented. *See, e.g.*, *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1513 (2017); *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1517 n.1 (2017). In fact, it has done so in this precise context. *See Tollett*, 411 U.S. at 268-69 (remanding because "we are not in a position to say whether [respondent] is presently precluded from raising the issue of the voluntary and intelligent nature of his guilty plea," *id.* at 268). Should the Court rule against

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[6] The government's reliance on *United States v. Vonn*, 535 U.S. 55 (2002), is misplaced. Resp. Br. 50. *Vonn* concerned the standard of review for a Rule 11 error. 535 U.S. at 62-63. But Petitioner does not allege the court erred when describing "the terms of a[] plea-agreement provision waiving the right to appeal," Fed. R. Crim. P. 11(b)(1)(N); rather, he alleges the court erred while going *beyond* its Rule 11 obligations and misinforming Petitioner about his appellate rights, which were not part of the plea agreement.

Petitioner, it should remand for a determination of whether his plea was voluntary, knowing, and intelligent.

CONCLUSION

The judgment of the District of Columbia Circuit should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF ALBERT W. ALSCHULER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

I am a member of the Illinois Bar and the Julius Kreeger Professor of Criminal Law and Criminology Emeritus at the University of Chicago Law School. I wrote my first article on guilty pleas and plea bargaining nearly fifty years ago, *see The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50 (1968), and I have published more than 700 law review pages on that subject. My interest in this case is simply that of a friend of this Court.[1]

SUMMARY OF ARGUMENT

Menna v. New York, 423 U.S. 61 (1975), and *Blackledge v. Perry*, 417 U.S. 21 (1974), support Petitioner Rodney Class's right to challenge on appeal the constitutionality of the statute he was convicted of violating. Class's claim, like those presented in *Menna* and *Blackledge*, would, if successful, forever preclude the state from obtaining a valid conviction against him. This claim should survive his guilty plea.

1. In fact, Class's claim should more clearly survive his plea than those of the petitioners in *Menna* and *Blackledge*. Unlike the petitioners in those cases, a defendant who establishes the unconstitutionality of his statute of conviction is

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[1] Pursuant to Supreme Court Rule 37.6, I declare that no counsel for a party authored this brief in whole or in part. My co-counsel and I are the only people who have made monetary contributions to the preparation and submission of this brief. In accordance with Rule 37.3(a), all parties consented to the filing of this brief. Petitioner provided blanket consent for all *amicus* briefs. A copy of Respondent's written consent was provided to the clerk upon filing.

innocent of any crime. Moreover, this defendant vindicates not only his own right to engage in constitutionally protected conduct but also the rights of others, many of whom might lack the resources, the legal standing, and the courage necessary to protect these rights themselves. A defendant's successful challenge to the statute he is alleged to have violated advances public interests as well as his own.

2. In habeas corpus proceedings, this Court has long afforded special protection to the right to challenge an unconstitutional statute. Even at a time when habeas petitioners were barred from presenting almost all other constitutional claims, this Court considered claims that petitioners had been convicted of violating unconstitutional statutes. *Ex Parte Siebold*, 100 U.S. 371 (1879). And when this Court denied full retroactivity to most decisions affording new constitutional protections to criminal defendants, it made an exception for decisions declaring "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"—in other words, to decisions declaring substantive criminal statutes invalid. *Teague v. Lane*, 489 U.S. 288, 307 (1989). Even a post-conviction petitioner who has pleaded guilty without questioning the criminality of his conduct may now obtain the benefit of a subsequent ruling that his conduct was lawful. *Bousley v. United States*, 523 U.S. 614 (1998). The Court should afford no less protection to the right to challenge the constitutionality of a statute on direct appeal than it provides in post-conviction proceedings.

3. The final section of this brief asks the Court not to preclude the possibility of affording greater protection to the right to challenge an allegedly unconstitutional statute than Class seeks here. Since this Court upheld the constitutionality of plea bargaining in 1970, this practice has become more troublesome. Increased sentences reflect both the efforts of prosecutors to gain plea bargaining leverage and the willingness of legislatures to supply it. Trials have become close to nonexistent. Boilerplate waivers that were almost unheard of in 1970 are now commonplace.

Prosecutors might respond to a decision recognizing Class's right to challenge the constitutionality of his statute of conviction by generating more boilerplate. Because Class's plea agreement neither expressly preserved nor expressly waived his right to challenge on appeal the constitutionality of his statute of conviction, his brief characterizes the issue in this case as what the contractual default rule should be. Brief for Pet. at 1, 2, 17, 19, 20, 21, 22, 35, 38, 44. Although this statement of the issue is accurate, it might convey the impression that added contractual language could make the right to challenge unconstitutional statutes disappear. The Court should avoid conveying this impression. It should make clear that the effectiveness of boilerplate waivers remains unresolved, as do other substantial issues.

ARGUMENT

I. *MENNA* AND *BLACKLEDGE* SUPPORT PETITIONER'S RIGHT TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE HE WAS CONVICTED OF VIOLATING, AND HIS CLAIM IS IN FACT STRONGER THAN THE CLAIMS UPHELD IN THOSE CASES.

In *Menna v. New York*, 423 U.S. 61 (1975), and *Blackledge v. Perry*, 417 U.S. 21 (1974), this Court held that a guilty plea does not bar a defendant from arguing on appeal or in post-conviction proceedings that he was convicted in violation of the Double Jeopardy Clause or that he was prosecuted in retaliation for exercising a procedural right. In this case, Class maintains that his guilty plea should not bar him from challenging on appeal the constitutionality of his statute of conviction. Class's brief shows that, under the standard established by *Blackledge* and *Menna*, his claim should survive his plea. Demonstrating the statute's unconstitutionality would block his prosecution in the same way that a successful claim of double jeopardy or vindictive prosecution would.

Following the decisions in *Blackledge* and *Menna*, Professor Westin offered the following formula as the best way to reconcile these rulings with earlier decisions that guilty pleas forfeit most claims of antecedent constitutional violations:

> [A] defendant who has been convicted on a plea of guilty may challenge his conviction on any ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much

> the state might endeavor to correct the defect. In other words, a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be "cured."

Peter Westin, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1226 (1977); *see United States v. Curcio*, 712 F.2d 1532, 1538 (2d Cir. 1983) (Friendly, J.) (declaring that Westin's "valuable commentary" has distilled the guiding principles of the Supreme Court's decisions concerning guilty-plea forfeiture).

Certainly the fact that a defendant's conduct was not a crime should "forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect," and Class maintains that the statute he has been convicted of violating created no crime. His claim of innocence only makes his case stronger than those of the petitioners in *Menna* and *Blackledge* themselves.

Punishing someone for engaging in noncriminal behavior is obviously a grave injustice. Moreover, the public has an especially strong interest in preventing this injustice. Its resources are misspent when the government imprisons people for doing what the Constitution allows them to do. Beyond that, a litigant who establishes the unconstitutionality of a criminal statute vindicates the right of others to engage in behavior like his. When a statute makes this behavior a crime, it may not only chill but freeze the exercise of a constitutional right. Fearing punishment, people are likely to forego exercise of this right. Few may have the courage, the resources,

and the legal standing needed to challenge an unconstitutional criminal statute.

Professor Merrill notes that "some constitutional rights are not just private entitlements but also have aspects of public goods. In other words, the exercise of the right not only produces a private benefit for the rights-holder, but also generates positive externalities that benefit third parties or society more generally." Thomas W. Merrill, Dolan v. City of Tigard*: Constitutional Rights as Public Goods*, 72 Denv. U. L. Rev. 859, 862 (1995). Merrill uses economic language to explain why courts should be reluctant to find forfeitures of these rights and sometimes should refuse to enforce waivers that have been purchased by granting government benefits: "[I]ndividual valuation of the right will fail to take into account the positive externalities generated by exercise of the right, and thus routine enforcement of . . . waivers—especially on a mass scale . . .—could result in a suboptimal supply of these external benefits." *Id.*

When a defendant is punished for violating an unconstitutional statute, the injustice to the defendant himself runs deep, and the public interest in correcting this injustice runs deep too. The right that Class asserts merits protection at least as much as the rights vindicated in *Menna* and *Blackledge*. As the following section of this brief will show, this Court has long afforded distinctive protection to this right.

II. This Court's Habeas Corpus Decisions Have Afforded Special Protection to the Right Not to Be Convicted Under an Unconstitutional Statute.

In 1879, in *Ex Parte Siebold*, 100 U.S. 371 (1879), five prisoners convicted of violating a federal statute sought a writ of habeas corpus from this Court. They alleged that Congress had exceeded its power by enacting the statute they were convicted of violating. At the time, the Court adhered to "the black-letter principle of the common law that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 466 (1963) (citing *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193 (1830)).

The *Siebold* Court reiterated this rule:

> [The writ of habeas corpus] cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return . . . that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. . . . The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

100 U.S. at 375.

The Court nevertheless resolved on the merits the petitioners' claim that they had been convicted of violating an invalid statute. It cited *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), noting that "[t]he opinion of Chief Justice Vaughan in the case has rarely been excelled for judicial eloquence." *Siebold*, 100 U.S. at 376. In *Bushell's Case*, the Court of Common Pleas granted habeas corpus relief to a juror who had defied a judge's instructions by voting to acquit William Penn of participating in an unlawful assembly. The case established that courts have no authority to hold jurors in contempt for violating judicial instructions.

Siebold found a similar lack of authority when a defendant was prosecuted for violating an unconstitutional statute:

> The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. . . . [P]ersonal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that . . . the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* . . . . [I]f the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the

> causes. Its authority to indict and try the petitioners arose solely upon these laws.

100 U.S. at 376-77. *See also Ex parte Yarbrough*, 110 U.S. 651, 654 (1884) ("If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction, and the prisoners must be discharged.").

This Court still quotes *Siebold* with reverence. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 730-31 (2016) (quoting *Siebold* while distinguishing procedural errors from the violation of "categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose").[2] Even at a time when this Court refused to consider claims on habeas corpus that an indictment did not state an offense, *Ex Parte Parks*, 93 U.S. 18 (1876), that a defendant had been placed twice in jeopardy for the same offense, *Ex parte Bigelow*, 113 U.S. 328 (1885), or that a defendant had been compelled to incriminate himself, *In re Moran*, 203 U.S. 105 (1906), it recognized an obligation to afford relief to a defendant convicted under an unconstitutional statute. *Siebold* shows the distinctive character of the right asserted in this case.

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[2] *Montgomery* held that state courts must give retroactive effect to *Miller v. Alabama*, 567 U.S. 460 (2012), which held mandatory sentences of life without parole for juveniles unconstitutional. *Montgomery* declared that "a court has no authority to leave in place a conviction or sentence that violates a substantive rule" and that "no grandfather clause . . . permits States to enforce punishments the Constitution forbids." 136 S. Ct. at 731.

More than a century after *Siebold*, this Court again gave this right special protection—protection it did not afford to other rights, including those vindicated in *Blackledge* and *Menna*. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court adopted the position Justice Harlan previously had taken on the retroactivity of rulings announcing new constitutional rules of criminal procedure. The Court declared that newly announced procedural rules must be applied to all untried cases and all cases on trial or direct review when the rules are announced but that, with two exceptions, these rules do not entitle prisoners whose convictions were final at the time they were announced to habeas corpus relief.

The second of the Court's two exceptions allowed a habeas petitioner to claim the benefit of a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings. *Teague*, 489 U.S. at 309-15. This exception afforded full retroactivity to decisions like *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the Fourteenth Amendment's Due Process Clause entitles indigent defendants in state courts to the assistance of appointed counsel. This Court has not applied the second *Teague* exception to any post-*Teague* ruling.[3]

The first *Teague* exception has been much more influential. *See, e.g., Montgomery v. Louisiana*, *supra*, at 728-31. This exception was drawn verbatim from

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[3] *Teague* recognized that future decisions were unlikely to trigger this exception. *See Teague*, 489 U.S. at 313 (declaring it "unlikely that many such components of basic due process have yet to emerge").

Justice Harlan, and it allowed a habeas petitioner to claim the benefit of a new rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)). This exception afforded full retroactivity to decisions like *Loving v. Virginia*, 388 U.S. 1 (1967), which recognized the constitutional right of people of different races to marry. In this case, Class maintains that that the Second Amendment places his primary conduct beyond the power of the criminal law-making authority to proscribe.

This Court effectively expanded the first *Teague* exception when it held *Teague*'s limitation of the habeas remedy inapplicable to new rules of substantive criminal law. *See Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). The Court now affords full retroactivity not only to decisions declaring defendants' conduct beyond the power of Congress to proscribe but also to decisions declaring that Congress has not in fact proscribed their conduct.

Bousley v. United States, 523 U.S. 614 (1998), illustrates the breadth of the current doctrine. After a post-conviction petitioner pleaded guilty to using a firearm during a drug transaction, this Court held in *Bailey v. United States*, 516 U.S. 137 (1995), that "use" required active employment of the firearm. The petitioner asserted that his use was not active, and this Court held that establishing his claim would entitle him to post-conviction relief.

Bousley held *Bailey* fully retroactive because "decisions of this Court holding that a substantive

federal criminal statute does not reach certain conduct . . . necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley*, 523 U.S. at 620 (quoting *Davis v. United States*, 417 U.S. 333, 334 (1974)). Although the petitioner had not argued before trial, at trial, or on appeal that "use" meant active use and although he in fact had pleaded guilty, his default would be excused if he could show that the error in his case had "probably resulted in the conviction of one who is actually innocent." *Id.* at 623. Chief Justice Rehnquist wrote for the Court, "[O]ne of the principal functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.'" *Id.* at 620.

Although both the petitioner in *Bousley* and Class entered guilty pleas and although both maintained that their conduct was not criminal, Class's case is stronger than that of the petitioner in *Bousley* in several respects. First, unlike the petitioner in *Bousley*, Class contends not only that he is innocent but also that his conduct was constitutionally protected—that this conduct was beyond Congress's power to proscribe. Second, unlike the petitioner in *Bousley*, Class did not default his claim but instead litigated it fully in the district court prior to his guilty plea. Third, unlike the petitioner in *Bousley*, Class can establish his claim without any expansion of the record. And fourth, unlike the petitioner in *Bousley*, Class asserts his claim on appeal rather than in a post-conviction proceeding. Post-conviction relief is limited to "persons whom society has grievously wronged," and "an error that may justify

reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993).

This Court's special treatment of claims on habeas corpus that a prisoner has been convicted under an unconstitutional statute (and, more recently, of claims that a statute has been held not to reach his conduct) indicates why Class's guilty plea should not bar his appeal in this case.

III. This Court Should Not Preclude Defendants Who Plead Guilty from Obtaining Greater Protection of the Right to Challenge Unconstitutional Statutes Than Petitioner Seeks in This Case.

In 1970, in *Brady v. United States*, 397 U.S. 742 (1970), this Court upheld the constitutionality of plea bargaining. It declared, "[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." 397 U.S. at 753. Since 1970, however, the plea bargaining process has grown more troublesome.

A. Post-Plea Challenges to the Constitutionality of a Defendant's Statute of Conviction Before *Brady*

This case itself provides a minor indication of how much things have changed. In an earlier era, prosecutors and courts apparently did not imagine

that a guilty plea would have the effect the government now proposes to give it.

The Supreme Judicial Court of Massachusetts anticipated the *Menna* standard more than a century before *Menna* and explained why this standard permitted challenges like Class's: "The plea of guilty is, of course, a confession of all the facts charged in the indictment . . . . It is a waiver also of all merely technical and formal objections . . . . But if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged." *Commonwealth v. Hinds*, 101 Mass. 209, 210 (1869).

In 1924, a defendant who pleaded guilty appealed his conviction to the Mississippi Supreme Court. Although the defendant did not contend that the statute of his conviction was unconstitutional, the court noticed this statute's unconstitutionality *sua sponte* and reversed his conviction. *Norwood v. State*, 101 So. 366 (Miss. 1924).

Three years before *Brady*, in *Loving v. Virginia*, 388 U.S. 1 (1967), this Court reviewed the convictions of a married couple who had struck a bargain and entered guilty pleas to violating two Virginia anti-miscegenation statutes. *See id.* at 3-4 (describing the defendants' pleas); Bryan Brown, *The Right to Love: Fifty Years Ago, in* Loving v. Virginia, *the Supreme Court Made Mixed-Race Marriages Legal Across the U.S.*, New York Times Upfront (Jan. 9, 2017), http://upfront.scholastic.com/issues/01_09_17/the-right-to-love/ (describing the bargain). This Court did not question the defendants' right to have their guilty pleas set aside and their convictions vacated if the statutes were unconstitutional, and

neither did the Commonwealth of Virginia. Its brief defended the statutes without any suggestion that the defendants' pleas had "inherently" waived a "nonjurisdictional" error—namely, their conviction of actions that, far from being a crime, were constitutionally protected. Brief of Appellee-Respondent, *Loving v. Virginia*, 388 U.S. 1 (1967) (OT 1966 No. 395), 1967 WL 93641. Perhaps it was unthinkable even to the Virginia prosecutors that the state would continue to punish Richard and Mildred Loving if they had done only what the Constitution allowed them to do. If the position the government urges in the present case had been the law, however, this Court could not have made its landmark decision in *Loving*.

A year after *Loving*, this Court again reviewed and accepted an appellant's contention that he had pleaded guilty to violating an unconstitutional statute—a gun-registration statute that required him to incriminate himself. Justice Harlan's opinion for the Court addressed the issue posed by the present case in a one-sentence footnote: "Petitioner's plea of guilty did not, of course, waive his previous claim of constitutional privilege." *Hayes v. United States*, 390 U.S. 85, 87 n.2 (1968).

B. The Enhanced Power of Prosecutors

The years since *Brady* have seen harsher sentences, a sharp increase in the number of guilty pleas, the near disappearance of trials, and the explosion of prison populations. In 1970, fewer than 200,000 inmates were confined in state and federal prisons. The rate of incarceration (the number of inmates per 100,000 people) was 96. Today the number of inmates confined in state and federal

prisons exceeds 1.5 million (a greater than seven-fold increase since 1970), and the incarceration rate is 471 (a five-fold increase). Wikimedia Commons, *File: U.S. Incarceration Rates 1925 Onwards.png*, https://commons.wikimedia.org/wiki/File:U.S._incarceration_rates_1925_onwards.png (last visited May 14, 2017).[4]

The federal prison population has grown from approximately 24,000 in 1970, Federal Bureau of Prisons, Historical Information, https://www.bop.gov/about/history/, to 189,000 today (a slightly less than eight-fold increase). Federal Bureau of Prisons, Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited May 14, 2017) (reporting the total number of inmates on May 4, 2017).

Among the causes of the growth of the federal prison population are mandatory minimum sentences that, in practice, are mandatory only for defendants convicted at trial. *Compare United States v. Washington*, 301 F. Supp. 2d 1306 (M.D. Ala. 2004) (bemoaning a judge's duty to impose a "draconian" forty-year sentence mandated by 18 U.S.C. § 924), *with* U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 90 (2004) (reporting that, after the exercise of prosecutorial discretion in

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[4] These figures do not include local jail inmates. With jail inmates included, the total number of people imprisoned in America becomes 2.1 million, and the incarceration rate becomes 670. U.S. Department of Justice, Bureau of Justice Statistics, Correctional Populations in the U.S. 2015 at 2 Table 1 & 4 Table 4 (2016), https://www.bjs.gov/content/pub/pdf/cpus15.pdf.

charging and plea bargaining, only 20% of the defendants whose offenses qualified for the supposedly mandatory sentences prescribed by § 924 in fact received them). Both mandatory minimum sentences and formerly mandatory sentencing guidelines contributed to a doubling of the amount of time a convicted federal offender could expect to serve. *Id.* at 46.[5]

When the Federal Sentencing Guidelines were new, I wrote that, although they were likely to increase the bargaining power of prosecutors, "[g]uilty plea rates are currently so high that even substantial increases in prosecutorial bargaining power cannot yield great increases in these rates." Albert W. Alschuler, *The Selling of the Sentencing Guidelines*, *in* The U.S. Sentencing Guidelines: Implications for Criminal Justice 49, 91 n.4 (Dean Champion ed., 1989). But I was wrong. Guilty pleas, which accounted for 87% of federal district court convictions in the years before the Guidelines, *see* U.S. Sentencing Comm'n, *supra*, at 30, account for 97% today. *See* United States Attorneys' Statistical Report Fiscal Year 2015, Table 2A, https://www.justice.gov/usao/file/831856/download. As criminal caseloads and criminal dispositions have grown, the absolute number of criminal trials in the

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[5] Harsher prison sentences are not the only reason for the growth of the federal prison population. Even in periods of falling crime rates, both federal criminal caseloads and the proportion of convicted offenders sentenced to prison have increased. U.S. Sentencing Comm'n, *supra*, at vi, 76. It seems likely that, by reducing the cost of imposing criminal punishment, plea bargaining has given America more of it.

federal district courts has declined—from 5,097 in 1962, to 3,574 in 2002, to 2,220 in 2015. Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 493 (2004) (providing the figures for 1962 and 2002); United States Attorneys' Statistical Report, *supra*, at Table 2A (providing the figure for 2015). Professor Miller remarks that the Guidelines have "achieved the virtual elimination of criminal trials in the federal system." Mark L. Miller, *Sentencing Equality Pathology*, 54 Emory L.J. 271, 277 (2005).

In *Missouri v. Frye*, 566 U.S. 134 (2012), this Court noted, "[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes." *Id.* at 144 (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006)). The Court added in *Lafler v. Cooper*, 566 U.S. 156 (2012), "The expected posttrial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view the full price as the norm and anything less a bargain." *Id.* at 168 (quoting Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Calif. L. Rev. 1117, 1138 (2011)).

The Court's observations describe not just particular cases, but the American criminal justice system generally. It is doubtful that any polity would sentence 95 percent of all offenders to less than they deserve or to less than is necessary to protect the

public. Officials seem far more likely to impose "extra" punishment on a small minority of offenders to discourage exercise of the right to trial. The United States now imprisons a higher proportion of its population than any other nation in the world except the Republic of Seychelles. Roy Walmsley, World Prison Population List 2 (11th ed. 2015), http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf. It could not have achieved its record for mass incarceration by sentencing 95 percent of all offenders to less than they deserve.[6]

C. Boilerplate Waivers

If this Court rules in Class's favor, prosecutors are likely to add language to plea agreements in an effort to preclude challenges like his. This Court's decisions do not indicate whether their efforts would be effective. The Court's only examination of due process limits on plea-bargained waivers came in

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[6] I have commented:

> An agreement produced by an improper threat ("your money or your life") is involuntary, and a threat to impose "extra" punishment for standing trial is surely wrongful. The Constitution affords a right to trial, which means at a minimum that the government may not make standing trial a crime. . . . [The Supreme Court's empirical observations in *Lafler* and *Frye*] decimate the "voluntariness," "personal autonomy," "libertarian," or "freedom of contract" defense of plea bargaining.

Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 Albany L. Rev. 919, 923-25 (2016).

United States v. Ruiz, 536 U.S. 622 (2002). *Ruiz* held that the government may condition a plea agreement upon a waiver of the right to receive impeachment information from the government, but it left open whether the Constitution bars the government from insisting upon a waiver of the right to receive other *Brady* material or a waiver of other rights. *See id.* at 629; *Brady v. Maryland*, 373 U.S. 93 (1963).

Prosecutors have used their power not only to increase the number of guilty pleas but also to transform guilty pleas into broader waivers of rights. Agreements foreclosing the right to appeal were rare when *Brady* was decided. *See* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 128-29 (1995) (declaring that appeal waivers "emerged" "in recent years" and citing decisions in 1982 and 1986 that called these waivers "uncommon" and "not a widespread practice"). But the Federal Rules of Criminal Procedure now recognize these waivers, *see* Fed. R. Crim. P. 11 (b)(1)(N) (requiring courts to determine that a defendant understands "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence"), and "[i]n nearly two-thirds of the cases settled by plea agreement in [a federal court] sample, the defendant waived his right to review." Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005).

Other broad waivers remain controversial. In *Lafler*, *supra*, and *Frye*, *supra*, this Court held that defendants are denied the effective assistance of counsel when their lawyers fail to inform them of offers made by prosecutors and they later receive

sentences more severe than the prosecutors proposed. The Court's rulings pleased many commentators, one of whom observed, "The Supreme Court's decisions in these two cases constitute the single greatest revolution in the criminal justice process since *Gideon v. Wainwright*." Adam Liptak, *Justices' Ruling Expands Rights of Accused in Plea Bargains*, N.Y. Times, Mar. 22, 2012, at A1 (quoting Wesley Oliver). Another proclaimed, "Finally, the Court has brought law to the shadowy plea-bargaining bazaar." Stephanos Bibas, *Taming Negotiated Justice*, 122 Yale L.J. Online 35 (2012).

After this Court's decisions, however, a former federal prosecutor proposed adding the following language to all plea agreements:

> [T]he defendant is aware that defense counsel vary considerably in quality and experience, and that there is no advance guarantee that counsel in this case will give sound or even competent advice . . . . Knowing . . . that he may receive poor advice from his counsel, and that such advice (or failure to advise) may result in an outcome less favorable than he would receive with a typically competent lawyer, the defendant waives any remedy that would involve vacating his conviction or lessening the sentence ultimately imposed, in exchange for the government's agreement to negotiate a disposition of this case.

Bill Otis, Comment on *One Notable Case Showing Impact of and Import of* Lafler *and* Frye, Sent'g L. & Pol'y Blog (Nov. 26, 2012), http://sentencing.typepad.com/sentencing_law_and_policy/

2012/11/one-notable-case-showing-impact-and-import-of-lafler-and-frye.html.

Perhaps this former prosecutor's incantation can make two "landmark" Supreme Court decisions disappear, but courts, commentators, and state bar ethics committees disagree about the permissibility of the waivers he proposed. *See* Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance: Waiving* Padilla *and* Frye, 51 Duq. L. Rev. 647, 648-51, 662-65 (2013); Susan R. Klein *et al.*, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73 (2015); J. Vincent Aprile II, *Waiving the Integrity of the Criminal Justice System*, Crim. Just., Winter 2010, at 46; R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 San Diego L. Rev. 93, 108 (2011) ("Insisting on so-called ineffective counsel waivers impresses me as overreaching of the worst sort and fundamentally inconsistent with a prosecutor's obligation as a minister of justice.").

At present, the Justice Department does not allow federal prosecutors to include waivers of the right to effective legal assistance in their plea agreements. *See* Memorandum from Deputy Attorney General James M. Cole: Department Policy on Waivers of Claims of Ineffective Assistance of Counsel (Oct. 14, 2014), https://www.justice.gov/file/70111/download (declaring that although the Department of Justice "is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical," "[f]ederal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel.").

Descriptions of this case as presenting only an issue of what contractual default rule to apply could convey the impression that added language precluding constitutional challenges would be unproblematic. Readers of the Court's opinion in this case should understand, however, that this issue remains unresolved.

Despite my harsh criticism of plea bargaining, I have acknowledged that "[t]he time for a crusade to prohibit plea bargaining has passed." Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 Duq. L. Rev. 673, 706 (2013). Reservations about this practice, however, caution in favor of preserving the ability to litigate issues of special importance to the public—including the constitutional validity of criminal statutes.

CONCLUSION

In cases like *Ex Parte Siebold*, 100 U.S. 371 (1879), and *Teague v. Lane*, 489 U.S. 288 (1989), this Court has afforded special protection to the right not to be convicted under an unconstitutional statute. The Court should protect this right by allowing Rodney Class to challenge on appeal the constitutionality of the statute he was convicted of violating. The Court should also leave open the possibility of affording this right greater protection than is at issue in this case.

Respectfully submitted,

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

BRIEF OF THE INNOCENCE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Project is an organization dedicated primarily to providing pro bono legal and related investigative services to prisoners for whom evidence discovered post-conviction can provide proof of innocence. The Innocence Project also seeks to prevent future wrongful convictions by researching their causes and pursuing reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's work serves as an important check on the awesome power of the state over criminal defendants and helps to ensure a safer and more just society.

The advent of forensic DNA testing and the use of that testing to review criminal convictions have provided scientific proof that our system is susceptible to convicting the innocent and that wrongful convictions are not isolated events. To date, 350 wrongfully convicted individuals have been exonerated through DNA testing. Over ten percent of those wrongfully convicted defendants pleaded guilty to crimes they did not commit. Despite their innocence

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1. The parties have consented to the filing of this brief. Petitioner has filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus curiae* briefs. Respondent's consent is filed herewith. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

and despite being charged with serious violent felonies, these individuals took pleas that resulted in lengthy prison sentences. The pressures that led these innocent defendants to plead guilty are also brought to bear in cases involving lesser criminal offenses, and those same pressures can likewise compel a guilty plea for conduct that is constitutionally protected. Because over ninety-five percent of criminal cases are resolved through plea bargaining, and because both legally and factually innocent people nevertheless plead guilty, such convictions should be reviewable for constitutional infirmities. The Innocence Project thus has a strong interest in ensuring that courts retain the ability to review the constitutionality of convictions secured through guilty pleas.

SUMMARY OF ARGUMENT

The American criminal justice system has evolved from a system of trials into a system of plea bargains. At both the state and federal level, the overwhelming majority of defendants who are convicted enter guilty pleas rather than risk a trial. As the Court has recognized previously, any decision concerning the scope of a defendant's rights must account for the central role that plea bargaining plays with respect to conviction and sentencing.

Today, many defendants—including innocent defendants—plead guilty primarily to receive less severe sentences. The criminal justice system places these defendants under tremendous pressure to plead guilty. Prosecutors charge these defendants with offenses punishable by lengthy sentences, then offer to reduce the charges and maximum sentences significantly in exchange for guilty pleas. Defense attorneys, trying

to spare their clients from unnecessarily long prison terms, often counsel in favor of guilty pleas, even when the defendants assert their innocence. In many cases, the defendants are indigent, unable to make bail, and likely to face lengthy periods of pre-trial incarceration. As a result of these pressures, questions of guilt and innocence or the constitutionality of the underlying statutes are often secondary, with the decision to plead guilty driven by the desire to leave jail as soon as possible.

The Court should hold that a defendant who has pleaded guilty may nevertheless challenge the constitutionality of the statute of conviction on direct review. Such a ruling would stand as an important check against legislative and prosecutorial overreach and misconduct. Given the sheer number of defendants who plead guilty instead of proceeding to trial, criminal convictions that offend the Constitution would in many cases be unreviewable in the absence of a rule permitting a defendant to bring a post-plea challenge to the constitutionality of the statute of conviction. Such a result cannot be reconciled with the Court's prior recognition that its jurisprudence should account for the primacy of plea bargaining in the criminal justice system.

ARGUMENT

I. THE AMERICAN CRIMINAL JUSTICE SYSTEM IS A SYSTEM OF PLEA BARGAINS, NOT TRIALS.

Constitutional protections around the plea-bargaining process are in many respects more critical to the proper and fair functioning of the American criminal justice

system than those that protect criminal defendants during arrest or at trial. The American criminal justice system is "for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). During Fiscal Year 2016, 97.3 percent of federal convictions were the result of guilty pleas. U.S. Sentencing Comm'n, 2016 Sourcebook of Federal Sentencing Statistics, Figure C. This was no aberration. In each of the last ten fiscal years, at least 95.8 percent of federal convictions were the result of guilty pleas. *Id.*; U.S. Sentencing Comm'n, 2011 Sourcebook of Federal Sentencing Statistics, Figure C. And in every fiscal year since 1994, more than ninety percent of federal convictions were the result of guilty pleas. *Id.*; U.S. Sentencing Comm'n, 2006 Sourcebook of Federal Sentencing Statistics, Figure C; U.S. Sentencing Comm'n, 2001 Sourcebook of Federal Sentencing Statistics, Figure C; U.S. Sentencing Comm'n, 1996 Sourcebook of Federal Sentencing Statistics, Figure C. A similar percentage of state-level convictions are the result of guilty pleas. *See Missouri v. Frye*, 566 U.S. 133, 143 (2012) ("ninety-four percent of state convictions are the result of guilty pleas") (citations omitted).[2]

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2. More recent state-level data confirms that this conclusion remains valid today. *See, e.g.*, Judicial Council of California, 2016 Court Statistics Report, Statewide Caseload Trends 2005-2006 through 2014-2015 at 62, 75 (2016), http://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf (136,017 of 139,927 felony convictions (97.2 percent) and 42,652 of 43,018 misdemeanor convictions (99.1 percent) in Superior Courts were the result of guilty and no contest pleas); M. Hall, et al., Structured Sentencing Statistical Report for Felonies and Misdemeanors: Fiscal Year 2014/15, North Carolina Sentencing & Policy Advisory Comm'n at 8 (April 2016), http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy14-15.pdf (28,617 of 29,232 convictions (97.9 percent) were the result of guilty pleas); South Carolina Department of Public

Thus, as this Court has recognized previously, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 566 U.S. at 144 (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992) (emphasis in original)). Accordingly, "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id.* Consequently, the rights of the defendant—to effective assistance of counsel and otherwise—"cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *See Lafler*, 566 U.S. at 170 (remedying defense counsel's ineffective assistance in connection with plea offer).

The constitutional protections around the plea-bargaining process should include the right of a defendant

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Safety, Office of Highway Safety & Justice Programs, Statistical Analysis Center, South Carolina Criminal & Juvenile Justice Trends at 85 (2013), http://www.scdps.gov/ohsjp/stats/cjtrends/2013%20Crime%20Book%20V11%20electronic%20version-edited.pdf (46,435 of 47,134 convictions (98.5 percent) were the result of guilty pleas); Tennessee Judiciary, Annual Report of the Tennessee Judiciary: Fiscal Year 2013-2014 at 21 (2014), http://www.tsc.state.tn.us/sites/default/files/docs/annual_report__fy2014.pdf (76,090 of 81,130 convictions (93.8 percent) were the result of guilty pleas); Office of Court Admin., Annual Statistical Report for the Texas Judiciary: FY 2015 at Detail-10 (2015), http://www.txcourts.gov/media/1308021/2015-ar-statistical-print.pdf (105,600 of 109,518 convictions (96.4 percent) in Texas District Court criminal cases were the result of guilty or *nolo contendere* pleas); Virginia Criminal Sentencing Comm'n, 2016 Annual Report at 26 (Dec. 1, 2016), http://www.vcsc.virginia.gov/2016Annualreportfinal.pdf (90.6 percent of convictions for felonies subject to sentencing guidelines were the result of guilty pleas).

to challenge the constitutionality of his conviction on direct appeal after pleading guilty. A ruling that defendants have no such right would encourage prosecutors to overreach, secure in the knowledge that a guilty plea renders virtually all abuses and violations of the United States Constitution immune from judicial review.

II. DEFENDANTS PLEAD GUILTY TO RECEIVE SHORTER SENTENCES EVEN WHEN THEY MAY NOT BE GUILTY.

The criminal justice system's reliance on pleas places pressure on all defendants to plead guilty. Capital defendants are pressured to plead guilty to avoid the possibility of a death sentence. Indigent defendants who are charged with misdemeanors and unable to make bail are pressured to plead guilty to avoid lengthy pretrial detention periods and secure their own release from jail. Neither innocent nor guilty defendants want to receive the most severe punishments available under the law or endure the stress and uncertainty of trial, and their decisions to plead guilty or not are informed by these pressures. Put differently, life and liberty are often the prevailing considerations, rather than guilt or innocence.

That these pressures operate on innocent and guilty defendants alike is well established. The National Registry of Exonerations identifies fifty-one Americans who pleaded guilty to murder but were later exonerated.[3]

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3. National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detailList.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Crime&FilterValue1=8_Murder&FilterField2=Group&FilterValue2=P (last visited May 18, 2017).

Likewise, the Innocence Project has identified thirty-seven defendants who pleaded guilty but were later exonerated by post-conviction DNA testing.[4]

Prosecutors play a central role in a defendant's decision to plead guilty. The leverage prosecutors use to induce pleas is an opportunity to plead guilty to reduced charges and accept the certainty of some—but less—time in prison or risk a trial on more serious charges and receive a longer sentence, often a significantly longer sentence or even death, if convicted. The prosecutor cannot make the decision for the defendant but has considerable influence over it. For example, a federal prosecutor may—and, under most circumstances, must—"charge and pursue the most serious, readily provable offense," *i.e.*, the offense that "carr[ies] the most substantial guidelines sentence, including mandatory minimum sentences."[5]

The prosecutor may also "'stack' charges carrying mandatory minimums in order to threaten or impose dramatic increases in mandatory sentences after a trial conviction." Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 228-29 (2007). In such a case, the difference between the maximum sentence after trial and the sentence provided for by the proposed plea "could become so large that some defendants would

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4. The Innocence Project, *DNA Exonerations in the United States*, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited May 18, 2017).

5. Memorandum from Att'y Gen. Jefferson B. Sessions to All Federal Prosecutors (May 10, 2017) https://www.justice.gov/opa/press-release/file/965896/download.

not accurately weigh their options and would not dare go to trial, even with a strong defense." Ronald F. Wright, *Trial Distortion and the End of Innocence In Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 109 (2005). Indeed, the likelihood of such a response from a rational defendant provides an incentive for a prosecutor to charge excessively, then offer a lesser sentence—or even a "market clearing" discount when the state's evidence is weak—in order to induce a defendant to give up his trial right and the possibility of acquittal. *See id.* Taken together, the parties' incentives and the authority given to the prosecutor create significant pressure for defendants who may not be guilty to plead guilty.

The available evidence confirms the disparity between sentences handed down after trial and those entered in connection with guilty pleas. For example, "in 2012, the average sentence for federal narcotics defendants who entered into any kind of plea bargain was five years and four months, while the average sentence for defendants who went to trial was sixteen years."[6]

Likewise, a study of sentencing data in five states revealed that, as in federal courts, "the average sentence after jury trial is more severe than the average sentence after guilty plea . . . ." Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial In Five Guidelines States*, 105 Colum. L. Rev. 959, 975 (2005). For example, in one state, the sentences for heroin distribution

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6. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

were 350 percent longer after trial by jury than they were after conviction by guilty plea. *Id.* at 973. *See also* David Brereton & Jonathan D. Casper, *Does it Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 Law & Soc'y Rev. 45, 56-57 (1982) (California robbery and burglary defendants more likely to be imprisoned than those who pleaded guilty).

Defense attorneys make their clients aware of these sentencing differentials in presenting the potential costs of exercising their right to trial, and "defendants would be a good deal less willing to plead guilty in the absence of a sentence-related inducement." Brereton & Casper, *supra*, at 69. Such inducements appeal to guilty and innocent defendants alike, as demonstrated by a recent empirical study that attempted to replicate the choice put to an innocent defendant who is offered a lenient plea bargain or a hearing on more severe charges. *See* Lucian E. Dervan & Vanessa A. Edkins, Ph.D., *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1 (2013). In the study, college students were falsely accused of cheating on a logic test. The students were given the option to either admit their guilt and forfeit the compensation they were promised for participating in the study or face an academic review board and risk a "sentence" in the form of a semester-long ethics course and disclosure to the school about their academic dishonesty. Approximately sixty percent of the innocent students nevertheless "admitted" guilt. *Id.* at 34.

Innocent defendants, like guilty defendants, plead guilty in exchange for lighter sentences because the benefits of doing so outweigh the costs of facing trial.

In other words, the pressures placed on these innocent defendants by the criminal justice system are so significant, and the alternatives to pleading guilty are so draconian, that it is a rational decision to plead guilty to crimes they did not commit. Many of these innocent defendants who plead guilty have been charged with minor offenses and want to "get out of jail, to avoid the hassle of having criminal charges hanging over their heads, or to avoid being punished for exercising their right to trial." John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 173 (2014). The vast majority of felony defendants are poor, and their choices to plead guilty despite their innocence are informed by their economic circumstances. Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1344 n.165, 1346-47 (2012) (citing Caroline Wolf Harlow, Ph.D, Bureau of Justice Statistics, Special Report: Defense Counsel in Criminal Cases, U.S. Dep't of Justice 1 (2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf (eighty percent of felony defendants in state courts cannot afford counsel)). Often, they cannot make bail and are therefore likely to be incarcerated until they plead guilty or are tried. *Id.* "For those with children, jobs, or other obligations, the deprivations inflicted by a month in jail can be worse punishment than they would face if they were convicted at trial." *Id.*[7]

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7. *See also* Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117 (2008) (arguing that, in low-stakes cases where innocent defendants bear significant "process costs"—such as pecuniary loss, inconvenience, and uncertainty of outcome—by going to trial, innocent defendants act rationally by pleading guilty); Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. Times, at SR5 (Mar. 10, 2012) (recounting case of single mother arrested on drug charges who spent a month in jail, then pleaded guilty

Innocent and guilty defendants may also plead guilty because of the pressure imposed upon them by prosecutors, defense counsel, and even judges whose heavy caseloads require them to quickly dispose of large numbers of cases involving low-level offenses, particularly in high-volume urban courthouses. Indeed, these systemic pressures often result in an auction-like atmosphere at misdemeanor arraignments, where the prosecutor and defense attorney make competing "bids" that they try to sell to the defendant within minutes of familiarizing themselves with the facts of a case. *See* M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 Drexel L. Rev. 373, 401-06 (2011) (describing the expedited misdemeanor arraignment process in New York City Criminal Court). If a defendant resists the pressure to plead guilty at arraignment and instead asserts his innocence and pursues a trial, he runs the risk that bail will be set, he will remain in custody, and his case will drag on, in some instances for more than a year. *Id.* at 405. This process tests neither the weight of the evidence nor the constitutionality of the underlying statute. Instead, it is a test of a misdemeanor defendant's endurance, usually to no end, since the costs of a drawn-out case typically lead the defendant to plead guilty, too. *Id.*

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in exchange for probation, despite her assertions of innocence, to return to her children); Kevin Johnson, *Who's Watching the Kids When Parents Get Arrested*, USA Today (July 31, 2014 7:55 AM) https://www.usatoday.com/story/news/nation/2014/07/31/children-left-behind-parents-arrested/13333909/ (former Deputy Attorney General James Cole "indicated that thousands of children could require" emergency placement as a result of parent's arrest).

In sum, defendants plead according to their perceptions of the risks involved, and many of these risks simply do not hinge on their actual guilt, the strength of the evidence, or, as discussed *infra*, the constitutionality of the underlying statute.

A. The Same Factors That Cause People To Confess To Crimes That They Did Not Commit Can Also Cause Them To Plead Guilty.

False confessions and guilty pleas by innocent defendants are each more likely when the defendant is given the right (typically short-term) incentive not to tell the truth. As Judge Rakoff has previously observed, "[r]esearch indicates that young, unintelligent, or risk-averse defendants will often provide false confessions just because they cannot 'take the heat' of an interrogation." Rakoff, *supra*, note 6. In addition, police investigators are trained to present suspects with false evidence of their guilt. Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 Law & Hum. Behav. 327 (2011). The innocent who confess in response do so as "an act of social compliance when they feel trapped by the apparent strength of the evidence against them and perceive no other means of escape." *Id.* False evidence also presents "a strong form of misinformation [and] can create confusion and lead people to doubt their own beliefs, at times internalizing guilt and confabulating memories for crimes they did not commit." *Id.* at 327-28.

Similarly, innocent defendants can be and often are pressured to plead guilty, though the pressure is not entirely adversarial and thus arguably more difficult

to withstand. The deal offered by the prosecutor—the promise of a reduced sentence if the defendant will only forego his right to a trial, coupled with the threat of a longer sentence if the agreement is rejected—provides a strong incentive to plead guilty. This incentive is often coupled with the pressure placed on the defendant by his own attorney, who, in many cases, advises the client "that there is a strong case against him, that his likelihood of acquittal is low, and that he faces" a lengthy prison sentence unless he quickly accepts the plea deal. Rakoff, *supra*, note 6. Defense attorneys who believe that it is in their client's best interest to accept a guilty plea will sometimes engage in "arm-twisting" to ensure that the client takes the deal. Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to Plea*, 65 Kan. L. Rev. 271, 303 (2016). Such arm-twisting may even include "enlisting 'capital experts' who will recount stories of trials that culminated in death sentences, getting family members to implore the client to take a plea to spare the family, and using religion as a basis for arguing that the defendant could be making a difference for fellow prisoners." *Id.* at 304. Thus, just as a police officer may coerce a suspect into confessing to a crime he did not commit, the innocent defendant's own attorney may create an environment in which the defendant feels trapped and can only "escape" by pleading guilty to a crime he did not commit.

B. A Defendant Is Likely To Be Ill-Equipped To Assess The Constitutionality Of His Conviction.

As this Court noted in *Brady v. United States*, 397 U.S. 742, 752 (1970), "[f]or a defendant who sees slight possibility of acquittal, the advantages of pleading

guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated." Defendants who violate a statute that is constitutionally defective are unlikely to be capable of assessing their chances of successfully challenging the statute and are thus likely to see only a slight possibility of acquittal.

To begin with, most defendants will be unable to evaluate their chances of successfully challenging the constitutionality of the statute under which they are charged. "Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with [a] crime, he is incapable, generally, of determining for himself whether the indictment is good or bad." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Most criminal defendants are also likely to be incapable of determining for themselves whether a statute passes constitutional muster.[8] In many misdemeanor cases, defense counsel at an arraignment will advise a defendant to plead guilty after a brief interview, the substance of which is limited to informing the defendant about the standard plea bargain for the charged offense. Fabricant, *supra*, at 402. Defendants are therefore unlikely to understand the legal nuances involving the constitutionality of the statute that they are charged with violating.

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8. *See* U.S. Sentencing Comm'n, 2015 Sourcebook of Federal Sentencing Statistics, Table 8, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table08.pdf (more than forty-five percent of criminal defendants sentenced in federal court lack a high school education and only 6.3 percent have graduated from college).

Instead, such defendants are likely to focus on whether they will be released from custody while the charges are pending if they reject the plea offer; whether they will be able to accept the offer at a later time; and potential pressure from a defense attorney who thinks that taking a plea is in the best interest of the client. To the extent the evidence alleged in the accusatory instrument is part of the calculus, consideration is typically focused on whether those allegations demonstrate that the defendant has violated the statute at issue, rather than whether the statute itself is lawful. All of which will likely leave the defendant with the impression that he has only a slight possibility of acquittal. Furthermore, so long as there is sufficient evidence of factual guilt alleged in the charging document, the defendant may feel that he is better off pleading guilty to a statute that is constitutionally defective than taking the chance that a court will disagree with him and rule that the challenged statute is constitutional—particularly if a plea results in his immediate release from custody. To safeguard the rights of such defendants, this Court should hold that a defendant may challenge the constitutionality of his conviction on direct appeal after pleading guilty.

III. THE COURT SHOULD HOLD THAT A DEFENDANT WHO HAS PLEADED GUILTY MAY CHALLENGE THE CONSTITUTIONALITY OF THE STATUTE OF CONVICTION ON DIRECT REVIEW.

The contours of a defendant's right to challenge the constitutionality of the statute of conviction should reflect the "central role plea bargaining plays in securing convictions and determining sentences." *See Lafler*, 566

U.S. at 170. A holding that a defendant waives his right to bring such a challenge by virtue of pleading guilty would foreclose an important avenue of exoneration under a "legal innocence" theory given that the statute of conviction is itself unlawful. Such a holding would also encourage prosecutorial overreach and potentially render convictions under unlawful criminal statutes effectively unreviewable.[9] Indeed, if post-plea appeals attacking the constitutionality of a statute of conviction are deemed to be waived by virtue of a guilty plea, only a fraction of the defendants convicted under constitutionally infirm statutes will be able to challenge them at all. Furthermore, a blanket rule that a guilty plea renders the statute of conviction unreviewable will incentivize prosecutors to overcharge defendants and threaten them with even longer sentences to ensure that plea bargains are accepted and the underlying laws are shielded from court review.

The Court has long recognized the necessity of providing defendants a check against prosecutorial overreach even after they have pleaded guilty. *See Menna v. New York*, 423 U.S. 61, 62-63 (1975) (permitting double jeopardy challenge even after defendant pleaded guilty); *Blackledge v. Perry*, 417 U.S. 21, 27-28, 31 (1974) (discussing the prosecution's motives to discourage appeals by encouraging guilty pleas and allowing due process challenges, related to vindictive or malicious prosecution, to survive guilty pleas). While there is a circuit split on how broadly to apply the rules in

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9. In accordance with the question presented to the Court, the argument made herein addresses only the scenario in which a defendant has not explicitly waived his right to appeal his conviction on direct review.

Blackledge and *Menna*, even the federal circuit courts that have interpreted *Blackledge/Menna* to allow only a small set of constitutional challenges to survive post-guilty plea have held that defendants who plead guilty can bring malicious prosecution claims. *See, e.g.*, *United States v. Carrasquillo-Penaloza*, 826 F.3d 590, 593 & n.4 (1st Cir. 2016) ("The Supreme Court has recognized two types of nonjurisdictional errors that are not waived by an unconditional guilty plea," including double jeopardy challenges and "due process challenge[s] arising from repetitive, vindictive prosecution.").

The right to challenge the constitutionality of a statute of conviction after entering a guilty plea is the necessary and logical extension of the Court's prior holdings guarding against legislative and prosecutorial overreach. Discriminatory enforcement of certain so-called quality of life offenses demonstrates why.

In recent years, local governments have enacted statutes targeting vagrancy, loitering, and panhandling with increased frequency.[10] Historically, such statutes have been disproportionately applied against poor communities of color. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (holding that a vagrancy statute was "void for vagueness, both in the sense that it fail[ed] to give a person of ordinary intelligence fair notice that

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10 *See* National Law Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, 21-22, https://www.nlchp.org/documents/No_Safe_Place (last visited May 18, 2017) (showing that between 2011 and 2014 there was a twenty-five percent increase in city-wide bans of begging in public and a thirty-five percent increase in city-wide bans of loitering in public).

his contemplated conduct is forbidden by statute . . . and because it encourage[d] arbitrary and erratic arrests and convictions") (internal citations omitted).[11] Prosecutions for violation of vagrancy and loitering statutes are precisely the sort of relatively low-stakes cases in which the costs and inconvenience of standing trial are likely to encourage a defendant—particularly a defendant of limited means—to plead guilty, even if the law's application to him is unconstitutional. A ruling that a defendant waives the right to challenge the constitutionality of such a statute by pleading guilty would therefore effectively insulate the statute and the prosecutor's application of it from any sort of constitutional scrutiny.

The Department of Justice Civil Rights Division's 2015 investigative report concerning the Ferguson Police Department (FPD) demonstrates the harm that can be inflicted on minority and impoverished communities when those charged with crimes are unable to effectively raise constitutional challenges.[12] The municipal court

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11. *See also* M. Chris Fabricant, *Rethinking Criminal Defense Clinics in "Zero Tolerance" Policing Regimes*, 36 N.Y. Univ. Rev. of L. & Soc. Change 351, 362-63 (2011) (explaining how New York's trespassing laws are enforced in a way that disproportionately affects the City's poorest communities); Jocelyn L. Santo, Note, *Down on the Corner: An Analysis of Gang-Related Antiloitering Laws*, 22 Cardozo L. Rev. 269, 271 (2000) ("[A]ntiloitering statutes were also enacted in the nascent American republic and continued after the Civil War" in order "to keep former slaves in a state of quasi-slavery.") (internal citation omitted).

12. *See* U.S. Dep't of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* (Mar. 4, 2015) (hereinafter "DOJ Ferguson Report"), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf.

of Ferguson adopted the unconstitutional practice of issuing arrest warrants due to missed court appearances and unpaid fines originating from minor offenses, such as parking infractions, traffic tickets, or housing code violations. *See* DOJ Ferguson Report at 3. Arrests occurred even though "[j]ail time would be considered far too harsh a penalty for the great majority of these code violations." *Id.* The report also described FPD's practice of making arrests for "a variety of protected conduct . . . [such as] talking back to officers, recording public police activities, and lawfully protesting perceived injustices." *Id.* at 24. The Department of Justice opined that a provision of the Ferguson Municipal Code, which "prohibits obstruction of government operations 'in any manner whatsoever,'" is "likely unconstitutionally overbroad." *Id.* at 24 n.16. The report further noted that the abusive prosecution of such misdemeanor offenses disproportionately affected the African American population in Ferguson: "African Americans account for 95% of Manner of Walking charges; 94% of all Fail to Comply charges; 92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of all Failure to Obey charges." *Id.* at 62. The blanket rule that the Respondent proposes—that a guilty plea waives a defendant's right to challenge the constitutionality of a conviction—would significantly limit defendants' ability to challenge such unlawful and discriminatory conduct by law enforcement officials.

Legislative and prosecutorial overreach are not limited to misdemeanors. Felony statutes can be overbroad and enforced beyond their intended purpose, too. The Racketeer Influenced and Corrupt Organizations Act ("RICO"), for example, makes it unlawful for "any person

employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." 18 U.S.C. § 1962(c). Congress enacted RICO to combat organized crime. *See United States v. Turkette*, 452 U.S. 576, 589 (1981). Prosecutors instead "seized on the virtually unlimited sweep of the language of RICO to bring a wide variety of different prosecutions in the form of RICO indictments" and used RICO "as a device to obtain federal jurisdiction to prosecute common-law crimes against persons or property that would normally be within the providence of local law enforcement." Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 662 (1987); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 Colum. L. Rev. 920, 921 (1987). In so doing, prosecutors ratcheted up the penalties for common-law crimes in a way Congress never intended, frequently targeting minority defendants.[13] A prohibition on hearing constitutional challenges made by defendants who plead guilty will ensure that such prosecutorial overreach will rarely be corrected.

Permitting a defendant to bring a post-plea challenge to the constitutionality of the statute of conviction would hardly burden the courts. Indeed, a number of states already allow defendants to bring constitutional

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13. *See* Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 Mich. J. Race & L. 303, 307-09 (2012) ("[T]he government has targeted relatively small and local groups of racial minority offenders, provided names for the groups, and labeled the groups as gangs even though the suspects disagreed with 'gang' labels.").

challenges, including facial challenges to constitutionally infirm statutes, post-guilty plea. *See, e.g., Lefkowitz v. Newsome*, 420 U.S. 283, 289 (1975) (recognizing that, under New York law, certain types of constitutional claims raised in pre-trial proceedings are not barred on direct and collateral review post-guilty plea); *Weeks v. State*, 362 P.3d 650, 654 (Okla. Crim. App. 2015) ("We have recognized that following a plea of guilty or *nolo contendere*, the *certiorari* review process permits a petitioner to raise a facial challenge to the constitutionality of the statute upon which their conviction rests."); *State v. Andrews*, 730 N.W.2d 416, 419 (S.D. 2007) ("[W]hile a guilty plea waives a claim that a statute is unconstitutional as applied, it does not waive a claim that a statute is facially unconstitutional."); *Rutti v. State*, 100 P.3d 394, 400-401 (Wyo. 2004) ("[C]hallenging the constitutionality of the statute under which the criminal defendant was charged does qualify as a jurisdictional defense," and therefore is not inherently waived by pleading guilty); *Courtney v. State*, 904 S.W.2d 907, 910 (Tex. Ct. App. 1995) ("[W]e now hold that a claim is jurisdictional . . . when it goes to the very power of the State to bring the defendant into court to answer the charge against him. This includes claims of . . . facial unconstitutionality of the statute prescribing the offense alleged," and thus the claim of facial unconstitutionality is not waived by a guilty plea.); *People v. Gertz*, 154 Misc. 2d 762, 766 (N.Y. Sup. Ct. 1992) (challenging the constitutionality of the statute the defendant is charged with violating presents a "jurisdictional issue[] which preclude[s] waiver"); *State v. Olson*, 380 N.W.2d 375, 379 (Wis. Ct. App. 1985) ("A challenge to the facial validity of a statute raises a jurisdictional defense which survives a guilty plea.").

Moreover, as the Court recognized in *Lefkowitz*, permitting constitutional challenges on appeal post-guilty plea (as New York does) is arguably more efficient than forcing a defendant to risk trial in order to preserve such a challenge. In such a regime, "[t]he guilty plea operates simply as a procedure by which the constitutional issues can be litigated without the necessity of going through the time and effort of conducting a trial, the result of which is foreordained if the constitutional claim is invalid." 420 U.S. at 289-90. The Court recognized that "New York defendants who knew that federal habeas corpus would be foreclosed would again be dissuaded from pleading guilty and instead would insist on a trial solely to preserve the right to an ultimate federal forum in which to litigate their constitutional claims." *Id.* at 293. Given that a defendant pleading guilty acknowledges the facts at issue in the case, but does not concede the constitutionality of the statute at hand, a guilty plea should not be the singular roadblock to constitutional challenges on direct or collateral appeal.

The lack of uniformity between state and federal systems in affording criminal defendants the opportunity to raise constitutional issues after pleading guilty is fundamentally unjust. Federal criminal defendants should be afforded the same ability to bring timely constitutional challenges on direct review after pleading guilty and the opportunity for exoneration that exist under the law of many states.

CONCLUSION

For the reasons stated above, *amicus curiae* urges the Court to hold that a defendant who has pleaded guilty has not waived his right to challenge the constitutionality of the statute of conviction and may do so on direct review.

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 16-424

In the Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE* [1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts,

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[1] Petitioner's blanket letter of consent to the filing of *amicus* briefs has been filed with this Court. Respondent has consented to the filing of this brief; written documentation of that consent is being submitted concurrently. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission.

seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL and the clients its attorneys represent because the vast majority of criminal prosecutions end in guilty pleas. NACDL has a strong interest in protecting the fairness of plea bargains through clear default rules that help to level the playing field between prosecutors and defendants.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court, both as direct counsel and as *amicus*. This case implicates several issues of importance to the ACLU's members, including ensuring that unconstitutional statutes that may deter or chill constitutionally protected activity are reviewed at the earliest possible opportunity.

Here, NACDL and the ACLU seek this Court's confirmation of the *Menna-Blackledge* default rule under which a defendant's right to appellate review of a claim that a statute is unconstitutional is not waived *sub silentio* through an unconditional guilty plea.

INTRODUCTION AND SUMMARY OF ARGUMENT

Unconditional guilty pleas do not implicitly waive constitutional challenges to the underlying statute of conviction. A holding to the contrary would contravene this Court's precedents and hinder the judiciary's ability to review and strike down unconstitutional statutes, leaving invalid laws on the books to wrongly chill lawful conduct. There is no good reason to shield an unconstitutional criminal statute from judicial review at the earliest possible opportunity.

Under *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), a guilty plea is "an admission of factual guilt," which "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt." *Menna*, 423 U.S. at 62 n.2. Thus, a defendant's claim that his confession was unconstitutionally coerced is rendered irrelevant by a guilty plea because it is not logically inconsistent with factual guilt. See *Blackledge*, 417 U.S. at 30. But when "the claim is that the State may not convict petitioner no matter how validly his factual guilt is established," that claim is preserved even after an unconditional guilty plea. *Menna*, 423 at 62 n.2. The claim at issue here—that the statute on which the conviction is premised is unconstitutional—falls squarely in the latter category, and therefore should be preserved.

A guilty plea forecloses trial and sets a new course, after which a defendant can challenge case-specific procedural errors relating to his factual guilt only by expressly preserving his appeal rights under

Rule 11(a)(2). But a guilty plea, without more, poses no bar to a substantive constitutional challenge to the statute of conviction, because such a claim goes to the State's very power to impose charges and precludes conviction notwithstanding factual guilt. That is true both with respect to claims that the statute of conviction is unconstitutional on its face and those that the statute is unconstitutional as applied. In both settings, whether the defendant is factually guilty is of no moment, because the claim is that the government lacks the power to prohibit his conduct. See *Haynes* v. *United States*, 390 U.S. 85, 87 n.2 (1968).

Amici therefore fully support Petitioner's argument on the merits: An unconditional guilty plea concedes only factual guilt, and does not, standing alone, relinquish the right to challenge the constitutionality of the statute that forms the basis of the conviction. We write separately to emphasize that there is nothing to be gained—and much to be lost—by letting unconditional guilty pleas, like Petitioner's here, silently foreclose such challenges.

I. As this Court has recognized, today's criminal justice system is largely a system of pleas, not trials. And plea bargaining does not take place on a level playing field. Prosecutors typically have greater resources, more information, and vast discretion in making charges, thus maximizing their leverage during negotiations. Studies show that even defendants who would otherwise be acquitted are likely to plead guilty, given the realities of an under-resourced defense bar and the extraordinary power that prosecutors wield. Both the ubiquity of pleas and the structural imbalances inherent in the

bargaining process demand rules that ensure that constitutional protections are not too readily elided through the guilty plea process.

It would make little sense to require a defendant who does not contest his factual guilt to undertake a trial merely to preserve a constitutional challenge to the statute of conviction. Clarifying that unconditional guilty pleas do not by default waive substantive challenges to the State's very power to bring charges in the first place will ensure that substantive challenges to the statute of conviction are heard at the earliest opportunity. Getting unconstitutional laws off the books sooner rather than later serves the public interest—and not just the individual interest of the criminal defendant. This Court has long recognized that the public interest in preventing punishment of constitutionally protected conduct is so strong that it outweighs even the finality of a conviction. *Ex Parte Siebold*, 100 U.S. 371, 375-377 (1879). There is no basis for denying the opportunity to raise the same challenge on direct appeal.

II. The government's proposed alternatives to a presumption of prompt judicial review—relying upon the prosecutor's *noblesse oblige* to secure a conditional guilty plea under Rule 11(a)(2), or attempting to raise a substantive challenge on collateral review—are inferior alternatives. Neither procedure guarantees criminal defendants who plead guilty what is theirs by right: the opportunity to raise a timely challenge to the State's imposition of a punishment that is beyond its authority to impose. If such a right is waivable at all, it is only through a knowing, intelligent, and voluntary waiver expressly

provided in the plea agreement itself. No such waiver occurred here.

ARGUMENT

I. THE *MENNA-BLACKLEDGE* DOCTRINE SERVES THE PUBLIC INTEREST IN TESTING THE CONSTITUTIONALITY OF CRIMINAL STATUTES

Plea bargaining is central to today's criminal justice system. Who goes to prison, and for how long, is largely determined through the plea-bargaining process. In that context, the *Menna-Blackledge* doctrine plays a critical role in preserving challenges to the constitutionality of criminal statutes—and ensuring that lawful conduct is not chilled—by helping to strike down unconstitutional laws as soon as possible.

A. Plea Bargaining Dominates The Criminal Justice System

This Court has recognized that the criminal justice system is "for the most part a system of pleas, not a system of trials." *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012). Following decades of decline, the percentage of federal criminal cases culminating in a plea of guilty or nolo contendere has risen since 1980, as many cases that previously would have gone to trial are resolved through guilty pleas instead—including cases that would have resulted in acquittals. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 90-91, 105-106 (2005). In 1980,

just 81% of federal criminal convictions were the result of guilty pleas.[2] According to the most recent figures available, guilty pleas now account for 97% of federal convictions.[3]

State felony convictions tell a similar story. In 1970, it was estimated that between 70 and 85% of state felony convictions were the result of guilty pleas. See *Brady* v. *United States*, 397 U.S. 742, 752 n.10 (1970). By 2006, 94% of state felony convictions resulted from pleas of guilty or nolo contendere.[4] Critical constitutional guarantees thus cannot be given effect without accounting for "the central role plea bargaining plays in securing convictions and determining sentences." *Lafler*, 566 U.S. at 170; see also *Missouri* v. *Frye*, 566 U.S. 133, 143-144 (2012); *Padilla* v. *Kentucky*, 559 U.S. 356, 373-374 (2010).

Defendants plead guilty at such high rates because broad criminal statutes and severe, mandatory sentences give prosecutors enormous leverage over them. See Wright, 154 U. Pa. L. Rev. at 85. As a result of overlapping criminal statutes, "a single episode may fall within the definition of several criminal offenses, ranging from trivial

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[2] See Ronald F. Wright, *Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background*, Wake Forest Univ. Legal Studies Paper (Sept. 2005), Appendix 1 (Disposition of Federal Criminal Cases and Defendants, 1871-2002), http://bit.ly/2r8Q8tg.

[3] See University at Albany, Sourcebook of Criminal Justice Statistics Online, Table 5.34.2010, http://bit.ly/2pPBmnb.

[4] Dept. of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 2006, at 1 (2010), http://bit.ly/2oSOEC2.

misdemeanors to serious felonies." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1962 (1992). At the same time, mandatory minimum penalties and structured sentencing make sentencing outcomes predictable, particularly in the federal system. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1128 (2011).

Prosecutors thus have the power to determine the length of a defendant's likely sentence through their charging decisions—and are free to invoke the threat of greater punishment to induce a plea of guilty. See *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). Indeed, one of the very *purposes* of longer statutory sentences is to enhance the already-significant power of prosecutors by giving them more "plea-bargaining chips." Bibas, *Regulating the Plea-Bargaining Market*, 99 Cal. L. Rev. at 1128; see also Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006) ("[L]onger sentences exist on the books largely for bargaining purposes."). And federal prosecutors are required to use every chip at their disposal: Just last week, the Attorney General issued a memorandum announcing that "it is a core principle that prosecutors should charge and pursue the most serious, readily provable offense." Dept. of Justice, Memorandum for All Federal Prosecutors from the Att'y Gen., *Department Charging and Sentencing Policy* (May 10, 2017), http://bit.ly/2qaeaTG.

On the other side of the ledger, significant sentencing discounts are available to defendants who comply with prosecutors' demands. See, *e.g.*, U.S.

Sentencing Guidelines Manual § 3E1.1 (decreasing the offense level where the defendant "clearly demonstrates acceptance of responsibility for his offense"); *id.* § 5K1.1 (providing for departure from the guidelines recommendation "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person"). These developments have made it extraordinarily costly for a criminal defendant to refuse a guilty plea. It is therefore unsurprising that "fewer [have] paid the price each year." Wright, 154 U. Pa. L. Rev. at 85.

The pressure to plead guilty is particularly acute for indigent defendants. Overburdened public defenders often lack the time and resources necessary to try cases or to negotiate more favorable plea agreements for their clients. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2479-2480 & n.60 (2004). Court-appointed counsel are subject to similar pressures. See *id.* at 2477. Indigent defendants therefore plead guilty at higher rates than other defendants. See Dept. of Justice, Bureau of Justice Statistics, Special Report, *Defense Counsel in Criminal Cases*, at 8 (2000), http://bit.ly/2oQCWE8 ("State and Federal inmates who used public attorneys were less likely than those with private attorneys to have been tried by jury.").

These dynamics—broad and overlapping criminal statutes, severe mandatory minimum sentences, "acceptance of responsibility" sentencing discounts, and often-inadequate representation—not only place increased pressure upon indigent defendants to plead guilty, but may also decrease the quality of bargains

that are offered to them. After all, prosecutors have little reason to offer concessions to defendants who are already under tremendous pressure to plead. See Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. at 2477.

Given these power imbalances, and assuming it is even constitutionally permissible to foreclose substantive constitutional challenges to criminal statutes when defendants elect to concede factual guilt and forgo a trial, it should be the government's burden to negotiate an express waiver, rather than the defendant's obligation to try to secure a conditional plea. See also *infra*, at 21-22. That default rule helps to cabin the "coercive power of criminal process" that prosecutors already exert. *Town of Newton* v. *Rumery*, 480 U.S. 386, 400 (1987) (O'Connor, J., concurring).

B. Post-Plea Challenges To Unconstitutional Statutes Are Important

Given the preeminent role of pleas in the criminal justice system, it would make little sense to require a defendant who does not contest his factual guilt to undertake a trial merely to preserve a constitutional challenge to the statute of conviction. And that applies to both facial and as-applied challenges: Whether facial or as-applied, challenges to the constitutionality of the statute of conviction place at issue the government's power to prohibit conduct, not factual guilt. See Pet'r's Br. at 42-44. This Court's precedents confirm as much, as *Menna* and *Haynes*, where the Court heard substantive constitutional challenges on direct appeal notwithstanding a guilty plea, were both as-applied challenges. *Id.* at 42-43.

But aside from wasting judicial resources, the D.C. Circuit's holding that an unconditional guilty plea forfeits a constitutional challenge to the statute of conviction deprives courts of the opportunity to resolve important constitutional issues at the earliest possible opportunity—and within a context devoid of factual disputes. Landmark rulings been made in cases involving post-plea constitutional challenges, and permitting such challenges is consistent with the admonition that, when the Constitution places certain conduct beyond the power of the government to punish, there "is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Welch* v. *United States*, 136 S. Ct. 1257, 1266 (2016) (quoting *Mackey* v. *United States*, 401 U.S. 667, 693 (1971) (opinion of Harlan, J.)).

1. Permitting challenges to the constitutionality of a statute on direct appeal following a guilty plea furthers the strong public interest in determining the constitutionality of criminal statutes sooner rather than later. This Court has often recognized the imperative to provide early relief from an unconstitutional statute, lest protected behavior—*i.e.*, behavior beyond the government's power to punish—be chilled or deterred. That principle applies with special force where, as here, a criminal conviction, and the consequent loss of liberty, are at stake.

Thus, for example, this Court's precedents permit pre-enforcement review of the constitutionality of criminal statutes, even in the face of federalism concerns. When prosecution is threatened under a statute, it "is not necessary that [a person] first expose himself to actual arrest or prosecution to be

entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2342 (2014) (quoting *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974)); see also *Wooley* v. *Maynard*, 430 U.S. 705, 710 (1977). That is so even when it is a state prosecution that is threatened, because "a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity." *Steffel*, 415 U.S. at 462.

Relatedly, in the First Amendment context, courts may review claims that a statute is facially overbroad even when presented by a plaintiff to whom the statute could constitutionally be applied. Under the overbreadth doctrine, "persons who are themselves unharmed by the defect in a statute" may "nevertheless . . . challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Board of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 484 (1989) (internal quotation marks omitted). Waiting for the perfect plaintiff—who may never materialize because the statute deters his or her protected speech—makes no sense when the constitutional harm would otherwise go unremedied. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973).

Similarly, the foundational doctrine of *Ex parte Young*, 209 U.S. 123 (1908), permitting federal courts to enjoin the enforcement of state statutes on any constitutional ground, rests on the premise that federal courts should be open early to claims that a state prosecution would be unconstitutional, rather than require an individual or company to "await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court." *Id.* at 165. The "great risk" of wrongly imposed punishment, including fines and imprisonment, overrides even Eleventh Amendment concerns. *Ibid.*

A direct appeal challenging the constitutionality of a statute following an unconditional guilty plea serves this same goal of preventing unnecessary constitutional harm. In such a case, the individual has risked more than those for whom prosecution is merely threatened, by conceding his factual guilt (and the authority of the government to punish him if his constitutional argument is wrong). There is no reason to require a defendant to expend resources on a trial when there are no facts to find, just to bring a challenge on direct appeal. And there is every reason not to: Post-plea appeals further the strong public interest in early invalidation of unconstitutional statutes and present an excellent opportunity to resolve constitutional questions in a case where the facts are undisputed.

This Court's cases reveal as much. Landmark rulings have been made in cases in which individuals entered unconditional guilty pleas and then challenged the constitutionality of the statutes under

which they were convicted. For example, after their motions to dismiss the charges on constitutional grounds were denied, the petitioners in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), both entered pleas of nolo contendere to the criminal charges against them for violating the Texas anti-sodomy law, *id.* at 563, which under Texas law automatically preserved all issues previously asserted by written motion, Tex. Code Crim. P. Art. 44.02. Their appeals following those pleas resulted in this Court's ruling that the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their [private sexual] conduct without intervention of the government," *Lawrence*, 539 U.S. at 578, overruling *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). Moreover, because it appears that the *Lawrence* petitioners were sentenced only to fines, federal habeas review would not have been available to them.

There are other examples, too, in which a defendant who did not contest his or her factual guilt vindicated important constitutional rights. In the landmark decision *Loving* v. *Virginia*, 388 U.S. 1 (1967), this Court struck down Virginia's unconstitutional antimiscegnation statute and reversed the convictions of the petitioners on collateral review, notwithstanding the fact that they had pleaded guilty. See *id.* at 3; see also *United States* v. *Knowles*, 29 F.3d 947, 950-951 (5th Cir. 1994) (reversing conviction under Gun Free School Zones Act on direct appeal following unconditional plea).

It is not uncommon for a defendant to concede factual guilt, even if he has a substantial constitutional claim that he should be allowed to

engage in the conduct the state seeks to prohibit. Permitting direct appeals on such claims following unconditional guilty pleas allows the courts to vindicate both the individual's interest in not being prosecuted for protected conduct, and society's interest in removing unconstitutional statutes from the books at the earliest opportunity.

2. The government appears to concede that a defendant who pleaded guilty and "seeks the benefit of a substantive ruling establishing that the statute of conviction is unconstitutional" could "seek" relief on collateral review—if a *different* defendant secured that constitutional ruling first. Br. in Opp. at 18. That is the correct rule, provided that the petitioner is otherwise able to overcome the procedural hurdles to relief. In *Bousley* v. *United States*, 523 U.S. 614 (1998), for example, this Court held that a defendant who pleaded guilty to use of a firearm was entitled to review of his habeas petition on the merits, if he could show that a subsequent decision limiting the scope of conduct proscribed by the statute of conviction rendered him actually innocent of the charge. *Id.* at 616. In reaching that conclusion, this Court emphasized that, where there has been a subsequent decision holding that "a substantive federal criminal statute does not reach certain conduct," such that the petitioner is able to show that he is actually innocent of the crime with which he has been convicted, it would be "inconsistent with the doctrinal underpinnings of habeas review" to preclude a court from reaching his claim on the merits. *Id.* at 620-621.

But the government's suggestion that defendants like Petitioner simply wait for somebody else to

challenge the statute of conviction is hardly sufficient to protect the relevant constitutional interests. The reason why substantive rules can be used to vacate even decades-old convictions (and thus override the State's interest in finality), is that they conclusively establish that a defendant's confinement is unlawful—and has always been unlawful—rather than simply raise the risk that it might be inaccurate. *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 729-730 (2016). That rationale applies with equal force in the context of a direct appeal where, as here, a defendant maintains that a statute is unconstitutional—a paradigmatic substantive rule. *Welch*, 136 S. Ct. at 1265 ("[C]onstitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish" are substantive rules.).

Whatever finality interest might be secured by a guilty plea, it is manifestly less than the interest in finality of convictions *after* direct review, which must nevertheless give way to claims of substantive unconstitutionality. *Montgomery*, 136 S. Ct. at 730. The government should not be able to insist that a defendant wait in jail for someone else to secure a substantive constitutional ruling (see Br. in Opp. at 18), simply because the defendant does not contest the factual allegations against him.

This Court has explained that collateral attack is available after a guilty plea when the plea was not knowing and voluntary, or "where on the face of the record the court had no power to enter the conviction or impose the sentence"—citing *Menna* and *Blackledge* as examples of the latter condition. *United States* v. *Broce*, 488 U.S. 563, 569, 574 (1989).

A court therefore lacks the power to enter a conviction where, as here, the statute of conviction is unconstitutional. See *Montgomery*, 136 S. Ct. at 730 (A "conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.") (internal quotation marks omitted).

The *Menna-Blackledge* distinction between claims that are inconsistent with factual guilt (barred) and claims that require relief even if factual guilt is established (not barred) is therefore analogous to the procedural/substantive distinction in the habeas context. Procedural rules regulate the "manner of determining the defendant's culpability" and merely "raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Montgomery*, 136 S. Ct. at 730 (emphasis and internal quotation marks omitted). They are "not logically inconsistent" with factual guilt. *Menna*, 423 U.S. at 62 n.2. Substantive rules, on the other hand, "stand in the way of conviction" even "if factual guilt is validly established." *Ibid.*; see also *Montgomery*, 136 S. Ct. at 730 (recognizing that there is no possibility of a "valid result" "where a substantive rule has eliminated a State's power to proscribe the defendant's conduct").

The same societal interest and constitutional imperative recognized in habeas cases as requiring relief from even decades-old convictions also favors not barring adjudication of substantive constitutional claims on direct appeal simply because a defendant

entered an unconditional guilty plea.[5] To deprive a defendant of his right to challenge the statute of conviction on direct appeal merely because he does not contest *factual* guilt would allow the State to punish conduct that it may not be permitted to punish in the first place—all without appellate review. There is no legitimate rationale for precluding such claims on direct appeal.

II. THE GOVERNMENT'S PROPOSED ALTERNATIVES ARE NO SUBSTITUTE FOR DIRECT APPEAL

The government has suggested that curtailing the *Menna-Blackledge* doctrine will have "limited practical importance" because defendants can choose to enter a conditional guilty plea under Federal Rule of Criminal Procedure 11(a)(2) or seek collateral relief from their convictions in the event that some other defendant has succeeded in a constitutional challenge to the same statute. Br. in Opp. at 18. But neither the conditional plea mechanism set forth in Rule

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[5] The *Menna-Blackledge* test turns upon whether the claim at issue is "logically inconsistent with the valid establishment of factual guilt." *Menna*, 423 U.S. at 62 n.2. The language from *Menna* referring to the State being precluded "from haling a defendant into court on a charge," *id.* at 62, was not meant to limit the scope of issues appealable from unconditional pleas. But even if the Court were to agree that only those constitutional challenges that prohibit a State "from haling a defendant into court" can be appealed, challenges to the constitutionality of the convicting statute would satisfy that test. When a statute is unconstitutional, the government *never* had the power to proscribe that conduct, and the government violates the Constitution by haling a defendant into court to defend conduct that is constitutionally protected.

11(a)(2) nor collateral review procedures provide meaningful alternatives to direct appeal. If this Court affirms the limitations that the D.C. Circuit grafted on to the *Menna-Blackledge* doctrine, a crucial mechanism for assessing the constitutionality of criminal statutes will simply be lost.

A. Rule 11(a)(2) Does Not Provide A Meaningful Alternative To Direct Appeal

The government maintains that Rule 11(a)(2) provides an adequate opportunity for defendants to preserve constitutional claims in the context of a guilty plea, and that, in effect, the burden should be on the defendant to invoke this rule if he or she seeks to pursue a constitutional challenge. But that argument places too much weight on the availability of Rule 11(a)(2).

To begin with, Rule 11(a)(2) has no bearing on a *state* defendant's guilty plea, and therefore provides no general solution to the problem. Conditional plea mechanisms vary by state, see *People* v. *Neuhaus*, 240 P.3d 391, 394-395 (Colo. Ct. App. 2009) (surveying state law of conditional pleas), and several states do not permit them at all, see, *e.g.*, *State* v. *Keohane*, 814 A.2d 327, 329 (R.I. 2003) (per curiam). Thus, even assuming that the government is correct that Rule 11(a)(2) obviates the need for the *Menna-Blackledge* doctrine (and it is not), that argument, by its own terms, applies only to those defendants lucky enough to be charged in jurisdictions that allow conditional pleas in the first place.

In any event, while Rule 11(a)(2) provides a limited mechanism for federal defendants who plead guilty to preserve certain claims for appeal, it does

nothing to alter a federal criminal defendant's right to challenge the constitutionality of the statute under which he has been convicted. Nothing in the text of the rule even suggests that such challenges are irrevocably waived if not preserved in the form of a conditional plea. To the contrary, the Advisory Committee on Rules has expressly stated that, contrary to the government's position here, "[s]ubdivision 11(a)(2) . . . should *not* be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application." Fed. R. Crim. P. 11, Advisory Committee's Notes to 1983 Amendment (emphasis added).

That is not surprising. The conditional plea mechanism provided for by Rule 11(a)(2) is a poor substitute for direct appeal. The practical effect of requiring defendants to obtain conditional pleas would be the near-elimination of such challenges altogether. Rule 11(a)(2) is "intended to benefit courts and prosecutors, not defendants." *Gould* v. *United States*, 657 F. Supp. 2d 321, 330 (D. Mass. 2009). Thus, the rule provides that a conditional guilty plea may be entered only "[w]ith the consent of the court and the government." Fed. R. Crim. P. 11(a)(2). A prosecutor may withhold such consent "for any reason or for no reason at all." *United States* v. *Fisher*, 772 F.2d 371, 374 (7th Cir. 1985) (per curiam). Moreover, "[c]onditional pleas are not commonly offered by most prosecutors." *United States* v. *Drayton*, No. 12-2568-KHV, 2013 WL 789027, at *5 n.5 (D. Kan. Mar. 1, 2013); see also *United States* v. *Carvajal-Mora*, No. 08-CR-0059-CVE, 2009 WL 5171822, at *6 (N.D. Okla. Dec. 21,

2009); *Mackins* v. *United States*, No. 04-cv-261, 2009 WL 1563920, at *5 (W.D.N.C. June 1, 2009).

Nor are courts under any obligation to enter such pleas. Even a "blanket prohibition" on the entry of all conditional pleas may not "constitute error in any given case." *United States* v. *Davis*, 900 F.2d 1524, 1527-1528 (10th Cir.), *cert. denied*, 498 U.S. 856 (1990) (finding no error where district court refused to enter conditional plea on the ground that it would enable the defendant to appeal pretrial orders "while . . . serving his time"). Requiring a defendant to follow the procedure set forth in Rule 11(a)(2) to preserve constitutional challenges to his statutes of conviction would effectively leave him "at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010). Fundamental constitutional rights should not be so readily swept aside based on the mere possibility that prosecutors—who already have enormous leverage to extract unconditional guilty pleas—might choose to offer federal defendants a conditional plea under Rule 11(a)(2).

To be sure, some constitutional rights can be waived, assuming that waiver is knowing, intelligent, and voluntary, and made with sufficient awareness of the likely consequences. See *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Bousley*, 523 U.S. at 620. The *Menna-Blackledge* doctrine is best read as providing a default rule: A guilty plea, without more, cannot waive challenges that are not inconsistent with factual guilt, such as challenges to the constitutionality of the statute of conviction. That default rule does not bar waivers of substantive or constitutional claims, but puts the burden on the prosecutor to obtain from the defendant an express,

unambiguous waiver rather than tasking an already out-leveraged defendant with seeking the prosecutor's uncertain permission to preserve claims under a Rule 11(a)(2) conditional plea. Because plea bargains, like any contract, are negotiated in the shadow of the law, placing the burden on prosecutors to secure knowing waivers helps level the playing field.

The facts of this case illustrate why such a clear default rule is necessary—and why any ambiguity as to the scope of the rights being waived should be construed against the government, which holds most of the cards in the plea bargaining process. Petitioner, proceeding *pro se*, vigorously litigated his claims challenging the constitutionality of Section 5104 before accepting a plea agreement. That plea agreement did not expressly waive Petitioner's right to appeal the trial court's resolution of those constitutional claims. To the contrary, the agreement expressly disavowed any "promises, understandings, or representations . . . other than those contained in writing herein." J.A. 159.

The government relies on language in the agreement stating "[y]ou understand that by pleading guilty in this case you agree to waive certain rights afforded by the Constitution." J.A. 156. But that language does not on its face explain which "certain" constitutional claims were being waived, and is included in a section of the plea agreement entitled "Trial Rights"—strongly indicating that what Petitioner was waiving was only his constitutional trial rights, not his right to challenge the *constitutionality* of Section 5104. The "Appeal Rights" section of the agreement, moreover, states

only that Petitioner waived "the right to appeal the sentence in this case."[6] J.A. 157.

That is not an express waiver of all appeal rights. It is a fair reading of this record that the government knew or should have known that Petitioner did not intend to give up his claims regarding the constitutionality of Section 5104—and that he might have refused to plead guilty if he understood that to be the case. The government had ample opportunity to clarify these issues, both in drafting the plea agreement and during the course of the colloquy. It should not now benefit from its failure to do so—much less from its decision not to offer Petitioner, who proceeded *pro se* below, a Rule 11(a)(2) conditional plea deal.

B. Collateral Review Is No Substitute For Direct Appeal Under *Menna* And *Blackledge*

The government also suggests that a defendant raising a substantive constitutional challenge to the statute of his conviction could, under certain circumstances, seek relief from conviction on collateral review, based on a constitutional ruling secured by some other defendant. Br. in Opp. at 18. But a defendant should not have to wait for someone

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[6] Nor was Petitioner clearly informed that those claims were being waived. To the contrary, he was told that he could "appeal . . . if [he] believe[d] that [his] guilty plea was *somehow unlawful*." S.A. 102 (emphasis added). Petitioner immediately thereafter challenged the lawfulness of his conviction on appeal, providing further evidence that he never intended to waive those claims.

else to obtain a constitutional ruling—an uncertain prospect at best—in order to challenge his statute of conviction. Furthermore, collateral review, if it is available at all, provides a wholly inadequate substitute for direct appeal. Collateral review procedures present enormous, often insurmountable, obstacles to prisoners. Forcing defendants who contest the constitutionality of their statute of conviction to pursue their claims on collateral review would drastically reduce the likelihood of those claims being heard at all.

To begin with, there are considerable practical hurdles even to bringing a petition for collateral relief. Most significantly, prisoners seeking collateral review of their convictions have limited resources at their disposal—and most importantly, *no right to counsel*, see *Murray* v. *Giarratano*, 492 U.S. 1, 3-4 (1989); *Penn.* v. *Finley*, 481 U.S. 551, 555 (1987). Prisoners are thus largely on their own when it comes to navigating the various legal hurdles to collateral relief, of which there are many.[7]

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[7] Navigating the complex collateral review process can be challenging even for an experienced advocate. For many state and federal prisoners, those challenges may well be insurmountable. State and federal prison populations are significantly less educated than the general population. See Dept. of Justice, Bureau of Justice Statistics, Special Report, *Education and Correctional Populations*, at 2 (2003), http://bit.ly/2kRy7dn. Prisoners are also more likely to have diagnosed learning disabilities, less likely to have basic literacy skills, See Dept. of Educ., Nat'l Ctr. for Educ. Statistics, *Literacy Behind Bars: Results From the 2003 National Assessment of Adult Literacy Prison Survey*, at 27, 29 (2007), http://bit.ly/2oGboX6, and more likely to suffer from mental

As an initial matter, most U.S. Attorney's offices now include collateral attack waivers in their boilerplate plea agreements (as does the plea agreement in this case, see J.A. 157). See Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87 (2015) (in survey of 114 boilerplate plea agreements including at least one from each federal district, seventy-seven contained collateral attack waiver). Whether raising their own constitutional claims or seeking the benefit of a substantive rule secured by another defendant, federal prisoners who have not waived their right to collateral review must still overcome an array of procedural obstacles, including a strict, one-year limitations period, 28 U.S.C. § 2255(f), and a near-total bar on subsequent or successive petitions, *id.* § 2255(h). Put simply, it would be exceedingly difficult for a federal prisoner to obtain relief from his conviction on collateral review.

State prisoners seeking habeas relief have an even more arduous path. In addition to facing many of the same obstacles as federal prisoners, see 28 U.S.C. § 2254(b) (limitation on successive habeas corpus applications), *id.* § 2244(d)(1) (one-year statute of limitations), state prisoners must also contend with requirements "ranging from exhaustion of remedies, to fair presentment obligations, to procedural default rules, and above all, to the strong deference to the conclusions of fact and law reached by the state

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illness. See Dept. of Justice, Bureau of Justice Statistics, Special Report, *Mental Health Problems of Prison and Jail Inmates*, at 1, 3 (2006), http://bit.ly/2eRfbf2.

courts," *White* v. *United States*, 371 F.3d 900, 903 (7th Cir. 2004) (Wood, J., concurring).

Any one of these requirements standing alone would present a significant barrier to relief. For example, it takes the average non-capital habeas petitioner more than six years just to exhaust state remedies. See Nancy J. King, et al., *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed By State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, at 4 (August 2007), http://bit.ly/2pHiqef. Cumulatively, these hurdles will often prove insuperable. See *Edwards* v. *Carpenter*, 529 U.S. 446, 454 (2000) (Breyer, J., concurring) ("[T]he complexity of this Court's habeas corpus jurisprudence . . . in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure.").

The government never explains why its proposed wait-for-a-substantive-decision-in-another-case rule could possibly promote judicial efficiency or public policy. But given the practical and legal barriers discussed above, its suggestion that the availability of collateral review somehow minimizes the impact of the lower court's evisceration of the *Menna-Blackledge* doctrine rings hollow.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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